109-121

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~308.~~

THE MANHATTAN LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN G. BROUGHTON, AS SUBSTITUTED TRUSTEE UNDER THE DEED OF ELLENORA A. FERGUSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 6, 1880.

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INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	2	1
Complaint	4	2
Summons	10	3
Answer	12	4
Reply	21	6
Transcript from minutes	24	7
Judgment	28	8
Bill of exceptions	31	9
EVIDENCE ON PART OF PLAINTIFF.		
Policy of insurance	32	9
Summons, Nestell *vs.* Ferguson	41	12
Complaint, Nestell *vs.* Ferguson	43	12
Deed, Nestell *vs.* Ferguson	45	13
Appearance, Nestell *vs.* Ferguson	46	13
Answer, Nestell *vs.* Ferguson	47	14
Consent substituting trustee	49	14
Order appointing substituted trustee	50	15
Exemplification of record	52	15
Testimony of John G. Broughton	54	16
Testimony of William M. Mills	57	17
EVIDENCE FOR DEFENDANT.		
Testimony of Mr. Hoyt	62	18
Summons, Ferguson *vs.* Manhattan Life Insurance Company	63	19
Complaint, Ferguson *vs.* Manhattan Life Insurance Company	64	19

	Original.	Print.
Complaint, Ferguson *vs.* Manhattan Life Insurance Company	66	20
Answer, Ferguson *vs.* Manhattan Life Insurance Company	68	21
Trial of cause, Ferguson *vs.* Manhattan Life Insurance Company	74	23
Judgment, Ferguson *vs.* Manhattan Life Insurance Company	77	24
Certificate of clerk of court of common pleas	78	24
Testimony of Mr. Hoyt continued	79	25
Defendant's Exhibit B	80	25
Testimony of Robert D. Murphy	83	26
Deposition of Edward Q. Marsh	87	27
Testimony of Erastus F. Brown	88	27
EVIDENCE FOR PLAINTIFF.		
Testimony of James R. Cuming	92	29
William Sherwood	97	30
George Upton	100	31
John C. Southwick	105	32
George Hafner	107	33
Elizabeth Ferguson	110	34
George W. Fox	113	34
Catharine Cook	117	36
Nellie Ferguson	118	36
Gertrude Ferguson	122	37
Sarah Ferguson	124	38
Gertrude Ferguson	125	38
John M. Koster	126	38
William M. Mills	128	39
Alfred W. Walker	138	42
Ralph L. Parsons	139	43
TESTIMONY FOR DEFENDANT.		
Testimony of George C. S. Choate	157	49
Charge by the court	184	57
Requests of defendants to court to charge	195	61
Verdict of jury	204	64
Bill of exceptions signed	204	64
Assignment of errors	206	64
Joinder in error	209	65
Bond for damages and costs	212	66
Citation	214	67

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between John G. Broughton, as substituted trustee under the deed of Ellenora A. Ferguson, plaintiff, and The Manhattan Life Insurance Company, defendant, a manifest error hath happened, to the great damage of the said The Manhattan Life Insurance Company, as is said, and as appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fifth day of August, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth.

[SEAL.] JOHN I. DAVENPORT,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ of error is hereby allowed.
Dated August 5th, 1880.

SAM'L BLATCHFORD,
Circuit Judge.

(Indorsed:) Supreme Court of the United States. John G. Broughton, as substituted trustee under the deed of Ellenora A. Ferguson, def. in error, vs. The Manhattan Life Insurance Company, plain' in error. Writ of error to the circuit court of the United States for the southern district of New York. Fellows, Hoyt & Schell, att'ys for plain' in error, 158 Broadway, New York City.

Due service this day of a copy of the within writ of error is hereby admitted.
Dated, New York, August 6, 1880.

ERASTUS F. BROWN, *Plff's Att'y.*

(Stamped:) U. S. circuit court. Filed Aug. 6, 1880. John I. Davenport, clerk.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States for

the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify
3 that the following pages, numbered from four to two hundred and fifteen, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of The Manhattan Life Insurance Company, plaintiff in error, against John G. Broughton, as substituted trustee under the deed of Ellenora A. Ferguson, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-third day of September, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the said United States the one hundred and fifth.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

4 United States circuit court for the southern district of New York.

JOHN G. BROUGHTON, AS SUBSTITUTE TRUSTEE under the deed of Ellenora A. Ferguson, plaintiff,
against
THE MANHATTAN LIFE INSURANCE COMPANY, of New York, defendant.

The complaint of the above-named plaintiff respectfully shows to this court on information and belief, except as herein set forth:

First. That the plaintiff above named avers of his own knowledge that he is a citizen of the State of New Jersey, and resides at Bloomfield, in said State of New Jersey.

Second. That the defendant above named is a corporation, created
5 by and under the laws of the State of New York.

Third. That on or about the fifteenth day of June, A. D. 1864, the defendant aforesaid, in consideration of the annual payment to it of three hundred and twenty dollars, executed Ellenora A. Ferguson, a citizen of the State of New Jersey, residing at Red Bank, in said State of New Jersey, a policy of insurance (known as number 12366) on the life of Israel Ferguson, the husband of said Ellenora A. Ferguson, whereby it promised to pay to the said Ellenora A. Ferguson the sum of ten thousand dollars within thirty days after notice and proof of the death of the said Israel Ferguson.

Fourth. That the said Ellenora A. Ferguson had a valid interest in the life of the said Israel Ferguson at the time of effecting the said insurance, and also at the time of his death.

6 Fifth. That on or about the fourteenth day of April, 1876, at the city of New York, the said Israel Ferguson departed this life.

Sixth. That on or about the twentieth day of May, 1876, the said Ellenora A. Ferguson gave notice to and furnished the said defendant with proof of the death of the said Israel Ferguson, and otherwise performed all the conditions of the said policy on her part.

Seventh. That the defendant has not paid said sum, or any part thereof.

Eighth. That on or about the tenth day of February, 1877, said Ellenora A. Ferguson transferred to one John Jay Nestell, as trustee, by deed, the

said policy of insurance, and all moneys due and to grow due thereon, with authority to sue for and collect all such moneys due and to grow due thereon; which deed the plaintiff is at all times ready and willing
7 to produce, and also offers to produce upon the trial of this action.

Ninth. That by a judgment of the supreme court of the State of New York, duly entered in the office of the clerk of the city and county of New York, and of said supreme court, at the county court-house, in the city and county of New York, on the fifth day of June, 1879, in an action in which John Jay Nestell, as trustee under the deed of Ellenora A. Ferguson, was plaintiff, and Ellenora A. Ferguson and others, were defendants, said John Jay Nestell, as trustee under the deed of Ellenora A. Ferguson, was removed as such trustee, and the above-named plaintiff, upon the nomination of said Ellenora A. Ferguson, was duly appointed by the
8 said supreme court the substituted trustee under said deed to fill the vacancy by the removal of said John Jay Nestell.

Wherefore the plaintiff demands judgment against the defendant for the sum of ten thousand dollars, with interest thereon from August 18th, 1876, with costs, and for such other relief as the circumstances of the case may require.

ERASTUS F. BROWN,
Attorney for Plaintiff.

CITY AND COUNTY OF NEW YORK:

John G. Broughton, as substituted trustee under the deed of Ellenora A. Ferguson, plaintiff, being duly sworn, says that the foregoing complaint is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOHN G. BROUGHTON.

Sworn to before me this 9th day of June, 1879.
[L. S.] DANIEL R. GARDEN,
Notary Public, New York County.

9 (Endorsed:) United States circuit court for the southern district of New York. John G. Broughton, as substituted trustee under the deed of Ellenora A. Ferguson, against The Manhattan Life Insurance Company, of New York. Complaint. Erastus F. Brown, attorney for plaintiff, 76 Nassau st., New York City.

10 United States circuit court for the southern district of New York.

JOHN G. BROUGHTON, AS SUBSTITUTED TRUSTEE under the deed of Elenora A. Ferguson, plaintiff,
against
THE MANHATTAN LIFE INSURANCE COMPANY, of New York, defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty

days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgmen twill be taken against you by default for the relief demanded in the complaint.

Witness the honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of New York, this 9th day of June, in the year one thousand eight hundred and seventy-nine.

[L. S.] JOHN I. DAVENPORT,
Clerk.

ERASTUS F. BROWN, plaintiff' attorney. Office and post-office address, 76 Nassau street, city of New York, county & State of New York.

11 I hereby certify that on the 10th day of June, 1879, at the city of New York, in my district, I personally served the within summons & complaint upon the within named The Manhattan Life Insurance Company, of New York, by exhibiting to Henry Stokes, president thereof, the within original, and at the same time leaving with him a copy thereof.

Dated June 12, 1879.

LOUIS F. PAYN,
U. S. Marshal.

J. E. D.

U. S. circuit court. Filed June 12, 1879. John I. Davenport, clerk.

(Indorsed:) United States circuit court, southern district of New York. John G. Broughton, as substituted trustee under the deed of Elenora Ferguson, plaintiff, vs. The Manhattan Life Insurance Company of New York, defendant. Summons & complaint. Erastus F. Brown, plaintiff' attorney, 76 Nassau street, New York City.

12 United States circuit court for the southern district of New York.

JOHN G. BROUGHTON, AS SUBSTITUTED TRUSTEE under the deed of Elenora A. Ferguson,
vs.
THE MANHATTAN LIFE INSURANCE COMPANY.

The defendant, by its attorneys, Fellows, Hoyt & Schell, answering the complaint herein—

I. Admits that the defendant is a corporation created by and under the laws of the State of New York, being engaged in the business of life insurance in the city of New York, & a citizen of New York, as in said complaint alleged.

II. Defendant admits that on or about the 15th day of June,
13 1864, it issued and delivered a certain policy of insurance to Israel Ferguson therein named, upon his life, in manner and form and upon and subject to certain terms, conditions, and stipulations therein set forth and referred to, as by the said policy of insurance in the possession of said Elenora A. Ferguson, mentioned in the complaint of the plaintiff in this action, will fully appear, and to which defendant refers.

III. Defendant admits that it has not paid the sum mentioned in said policy of insurance or any part thereof.

IV. Defendant denies that Elenora A. Ferguson performed all the conditions of said policy on her part.

14 V. Defendant has no knowledge or information sufficient to form a belief as to any of the allegations in said complaint contained not heretofore specifically admitted or denied.

VI. Defendant, for a further and separate defence, alleges, on information and belief, that at the time of issuing the said policy of insurance, and from thenceforth down to and including the time of the commencement of this action, the said Elenora A. Ferguson and John J. Nestell, and both of them, were citizens, inhabitants, and residents of the State of New York; and defendant alleges, on information and belief, that at the time of the commencement of this action the plaintiff was a citizen, resident, and an inhabitant of the State of New York, and defendant alleges that this court has no jurisdiction of the parties or subject-matter

15 in this action, and ought not to have or hold further cognizance of the action.

VII. Defendant, for a further and separate defence, alleges, on information and belief, that the alleged judgment in the supreme court mentioned in the complaint was obtained by collusion between the parties thereto, and that the proceedings in said alleged suit and the judgment were and are, and each of them was and is, without jurisdiction of said court and illegal and void.

VIII. Defendant, for a further and separate defence, says that it was and is expressly provided in and by the terms of said policy of insurance, among other things, that in case the said Israel Ferguson, the as-

16 sured, should die by suicide, then the said policy should be null and void and of no effect, and defendant alleges, on information and belief, that the said Israel Ferguson did die by suicide at the city of New York, and that the death in said complaint alleged was by suicide.

IX. Defendant, for a further and separate defence, alleges that the said Israel Ferguson, in part payment of the premiums on said policy, made and delivered to defendant four certain promissory notes in the sum of one hundred and sixty dollars each, bearing date the 15th day of July, in the years 1864, 1865, 1866, and 1867, respectively; in which said notes it was provided that the interest thereon should be paid annually

17 in advance, and that in case of death of the said Israel Ferguson the amount of said notes should be deducted from said policy; which said notes, with interest thereon, remain unpaid.

X. Defendant, for a further and separate defence, alleges that an action was brought against this defendant by the said Elenora A. Ferguson in the court of common pleas for the city and county of New York, a court of general jurisdiction for the same cause of action set forth in the complaint herein, on or about the 30th day of October, 1876; that said action was duly brought to trial before Mr. Justice Richard R. Larremore and a jury, and all the issues therein tried, upon the 4th and 5th days of Decem-

18 ber, 1878, and a judgment was duly given on the merits for the defendant in said action, and that the defendant recover of said Elenora A. Ferguson the sum of one hundred and fourteen $\frac{90}{100}$ dollars, its costs and disbursements of said action, and the further sum of one hundred and fifty dollars, and that judgment accordingly was duly entered in the office of the clerk of said court, at the court-house in the city of New

York, on the 17th day of December, 1878, which said judgment has not been paid, and remains in full force and effect.

Wherefore defendant demands judgment that the complaint herein be dismissed with costs.

FELLOWS, HOYT & SCHELL,
Defendant's Attorneys, 158 Broadway.

CITY AND COUNTY OF NEW YORK, *ss:*

19 Henry Stokes, president of the Manhattan Life Insurance Company, the defendant, being duly sworn, says that the foregoing answer is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

HENRY STOKES.

Sworn to before me this 8th day of September, 1879.
HENRY W. KENNEDY,
Notary Public, Kings Co. (certificate filed in N. Y. Co.)

(Endorsed:) U. S. circuit court, southern district of N. Y. James G. Broughton, as substituted trustee under the deed of Elenora A. Ferguson, vs. The Manhattan Life Insurance Company. Orig. answer. Fellows, Hoyt & Schell, att'ys for def., 158 Broadway, N. Y. City.

20 Due service of a copy of the within answer is hereby admitted. Dated New York, Sept. 8, 1879.

ERASTUS F. BROWN,
Att'y for Pl'ff.

U. S. circuit court. Filed Oct. 13, 1879. John I. Davenport, clerk.

21 United States circuit court for the southern district of New York.

JOHN G. BROUGHTON, AS SUBSTITUTED TRUSTEE under the deed of Ellenora A. Ferguson, plaintiff,
vs.
THE MANHATTAN LIFE INSURANCE COMPANY, defendants.

The plaintiff replies to the counter claim contained in the answer of the defendant:

That he denies that he has any knowledge or information sufficient to form a belief as to any of the allegations in said answer setting up such counter claim.

ERASTUS F. BROWN,
Attorney for Plaintiff.

CITY AND COUNTY OF NEW YORK, *ss:*

22 John G. Broughton, as substituted trustee under the deed of Ellenora A. Ferguson, being duly sworn, says that he is the plaintiff in the above-entitled action, and further that the foregoing reply is true

of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOHN G. BROUGHTON.

Sworn to before me this 11th day of September, 1879.
[L. S.] DANIEL R. GARDEN,
(16) *Notary Public, New York County.*

(Endorsed:) United States circuit court for the southern district of New York. John G. Broughton, as substituted trustee under the deed of Elenora A. Ferguson, against The Manhattan Life Insurance
23 Company. Reply. Erastus F. Brown, attorney for plaintiff, 76 Nassau st., New York City.
And timely service is admitted of a copy of the within reply.
FELLOWS, HOYT & SCHELL,
Def't's Att'ys.

U. S. circuit court. Filed Oct. 1, 1879. John I. Davenport, clerk.

24 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Thursday, the eighth day of April, in the year of our Lord one thousand eight hundred and eighty.
Present, the honorable Wm. J. Wallace, judge.

JOHN G. BROUGHTON, AS SUBSTITUTED TRUSTEE under the deed of Elenora A. Ferguson,
vs.
THE MANHATTAN LIFE INSURANCE COMPANY.

This case being still on trial, the jurors sworn in it are called and severally answer to their names.
Mr. Hoxie sums up the case on the part of the defendant.
Mr. Brown sums up the case on the part of the plaintiff.
Charge is thereupon given by the court to the jury, who retire in charge of an officer duly qualified to attend them, and on their return say that they find a verdict for the plaintiff for eleven thousand three hundred and forty-eight dollars and seventy-eight cents ($11,348.78), and so say they all.
25 On motion of Mr. Hoxie, ordered that defendant have thirty days' stay of proceedings herein within which to prepare and serve a bill of exceptions.
On motion of Mr. Brown, ordered that the plaintiff have thirty days from the service of said bill of exceptions within to prepare and serve amendments to the same.

H. H. M.

A copy.
[L. S.] JOHN I. DAVENPORT, *Clerk.*

(Endorsed:) C. C. of the U. S., S. D. of N. Y. John D. Broughton, &c., vs. The Manhattan Life Ins. Co. Certified transcript from minutes.

26 U. S. circuit court.

JOHN D. BROUGHTON, AS SUBSTITUTED TRUSTEE under the deed of Elenora A. Ferguson,
against
THE MANHATTAN LIFE INS. CO., DEFENDANT.

CITY AND COUNTY OF NEW YORK, *ss:*

Garniss E. Baker, jr., of the said city, being duly sworn, doth depose and say that he did, on the 17th day of July, in the year one thousand eight hundred and eighty, serve upon Fellows, Hoyt & Schell, the attorneys for the defendant in the above-entitled action, a notice of which the annexed is a copy, by delivering the same to a person in charge of the office of said attorneys during business hours, said attorneys not being in.

27 GARNISS E. BAKER, JR.

Sworn to before me this 19th day of July, 1880.

FRANK H. SMILEY,
Notary Public, N. Y. Co.

(Endorsed:) U. S. circuit court. John G. Broughton, as substituted trustee, &c., pl'ff, against The Manhattan Life Ins. Co., d'f. Affidavit of service of notice of taxation of costs. Erastus F. Brown, pl'ff's attorney, 76 Nassau st., New York City.

28 United States circuit court for the southern district of New York.

JOHN G. BROUGHTON, AS SUBSTITUTED TRUSTEE under the deed of Elenora A. Ferguson, plaintiff,
against
THE MANHATTAN LIFE INSURANCE COMPANY, defendant.

The above-entitled action having been duly brought to trial, and being on trial on the eighth day of April, 1880, before Hon. William J. Wallace, judge, and a jury, and the jury having, after due deliberation had, rendered a verdict in favor of the plaintiff against the defendant on the said eight' day of April, 1880, for the sum of eleven thousand three hundred and forty-eight dollars and seventy-eight cents, the attorneys

29 and counsel for the respective parties being present in open court; and the interest having been now duly computed thereon from said eighth day of April, 1880, to the twenty-sixth day of July, 1880, amounting to one hundred & ninety-two dollars and ninety-one cents, and the costs having been duly taxed and adjusted at sixty-five dollars and fifty-seven cents, and on motion of Erastus F. Brown, attorney and counsel for the plaintiff, it is adjudged that John G. Broughton, as the substituted trustee under the deed of Elenora A. Ferguson, the plaintiff in the above-entitled action, have judgment against The Manhattan Life

30 Insurance Company, the defendant in the above-entitled action, for the sum of *of* eleven thousand six hundred & seven dollars and twenty-six cents, and that the plaintiff have execution there-

11,607 26.

for against the defendant, as by the rules and practice of this court prescribed.

Judgment signed this 26th day of July, 1880.

JOHN A. SHIELD,
Deputy Clerk.

(Endorsed:) United States circuit court, southern district of New York. John G. Broughton as substituted trustee, &c., vs. The Manhattan Life Insurance Company. Judgment roll. E. F. Brown, pl'ff's att'y. U. S. circuit court. Filed Jul' 26, 1880. John I. Davenport, clerk.

31 United States circuit court, southern district of New York.

JOHN G. BROUGHTON, AS SUBSTITUED TRUSTEE under the deed of Ellenora A. Ferguson, plaintiff,
against
THE MANHATTAN LIFE INSURANCE COMPANY, defendant.

This action was duly brought on for trial before the honorable William J. Wallace, district judge for the northern district of New York, and a jury, in the circuit court of the United States for the southern district of New York, at a stated term of said court, held in the city of New York, on the 5th day of April, 1880.

Erastus F. Brown, esq., appeared for the plaintiff, and N. B. Hoxie and James Otis Hoyt, esq's, for the defendant.

32 Mr. Brown opened the case for the plaintiff, and offered in evidence a policy of insurance on the life of Israel Ferguson.

It is admitted and marked "Plaintiff's Exhibit 1."

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK.

No. 12366.] [Annual premium, $320.00.

This policy of insurance witnesseth: That The Manhattan Life Insurance Company, in consideration of the sum of three hundred and twenty *days* and cents to them in hand paid by Mrs. Ellenora A. Ferguson, and of the sum of dollars and cents to be paid on or before the day of next, and of the annual premiums of three hundred and twenty dollars and cents, to be paid on before the 15th day of July (or half or quarter yearly in advance with interest) in every year during the continuance of this policy, do assure the life of Israel Ferguson, of New York, in the county of New York, State of New York,

Sum insured, $10,000.

33 for the sole use of the said Ellenora A. Ferguson, in the amount of ten thousand dollars, for the term of his natural life, from July 15th, 1864.

And the said company do hereby promise and agree to and with the said assured, her executors, administrators, and assigns, well and truly to pay or cause to be paid the said sum insured to the said assured, her executors, administrators, or assigns, for her sole use, within ninety days after due notice and satisfactory evidence of the death of the said Israel Ferguson, and proof of the just claim of the assured under this policy, deduct-

ing therefrom the amount of all unpaid notes given for loans on this policy, and all deferred premiums, if any, then existing. And in case of the death of the said Ellenora A. Ferguson before the decease of the said Israel Ferguson, the amount of the said insurance shall be payable to his children for their use, or to their guardian, if under age, within ninety days
34 after due notice and satisfactory evidence of the death of the said Israel Ferguson, and proof of the just claim of the assured, as aforesaid. Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that in case the said Israel Ferguson shall, without the consent of this company previously obtained in writing pass beyond the settled limits of the United States, the British provinces of the two Canadas, Nova Scotia, and New Brunswick, or shall without such previous consent visit those parts of the United States which lie west *on* the 23rd degree of longitude west from Washington, or, between the 1st of July and the 1st of November, those parts which lie south of the southern boundaries of the States of Virginia, Kentucky, Missouri, and Kansas, or shall enter upon a voyage on the high seas, or as a mariner, engineer, fireman, conductor, or laborer,
35 in any capacity upon service on any sea, sound, inlet, river, lake, or railroad, or in the manufacture or transportation of gunpowder or fireworks, or in submarine operations or mining, or into any military or naval service whatsoever (the militia not in actual service excepted), or in case he shall die by suicide, or by the hands of justice, or in *or in* consequence of a duel, or of the violation of any law of these States, or of the United States, or of the said provinces, or of any other country which he may be permitted under this policy to visit or reside in, then this policy shall be null, void, and of no effect.

This policy is incontestable after five years from its date, for or on account of errors, omissions, and misstatements in the application except as to age.

And it is also understood and agreed by the within assured to be the true intent and meaning hereof that if the declaration made by or for the said Ellenora A. Ferguson, in the application for this policy, or any part thereof, and bearing date the 15th day of June, 1864, and forming part of this contract, and upon the faith of which this policy is made,
36 shall be found in any respect untrue, then and in such case this policy shall be null and void; or in case the said Ellenora A. Ferguson shall not pay the said premiums on or before the day *the day* hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine.

And it is further agreed by the within assured, that the notice contained on the back of this policy is accepted by the assured as forming a portion of this contract, and in every case where this policy shall cease, or become or be null and void, all previous payments made thereon shall be forfeited to the said company, and that if assigned written notice shall be given to this company. Not binding on the company until countersigned by I. O. Halsey, of New York, and the advance premium paid.

37 In witness whereof the said The Manhattan Life Insurance Company have hereunto affixed their corporate seal, and by their presi-

dent and secretary signed and delivered this contract at New York this 15th day of June, one thousand eight hundred and sixty-four.

[L. S.] HENRY STOKES,
President.

I. L. HALSEY,
Ass't Secretary.

Countersigned this 15th day of June, 1864.

I. O. HALSEY.

NOTICE.—The premium on this policy is payable at the commencement of the risk in one annual payment. If the assured desire to pay semi-annually or quarterly, application must be made to the company in writing for permission, which the company will grant at its discretion. If the premium is payable semi-annually or quarterly, interest is chargeable on the deferred portion of the annual premium at the rate of seven per
38 cent. The premiums are always due on the several days stipulated in the policy, and all risk to the company commences at the time of the actual payment of the first premium without regard to the date of the policy (unless otherwise stipulated in the policy), and continues until the day named in the policy for the payment of the next premium at 12 o'clock noon and no longer.

No premium will be received by the company continuing any risk after the day named in the policy for the payment of such premium, unless the insured is in perfect health, and the risk continued at the entire option of the company, and no payment of premium is binding on the company, unless the same is acknowledged by a printed receipt, signed by the president or secretary of the company.

Agents are not authorized to bind the company by the issue of policies or permits, nor give receipts for the renewal of premiums, neither
39 are they authorized to waive forfeitures, or make, alter, or discharge contracts.

All receipts of the company at any time for premiums past due are received by the parties in interest as acts of courtesy of the company, and in no case to be considered a precedent nor as a waver of the forfeiture of the policy according to the conditions expressed therein.

N. B.—Persons insured who propose making a sea-voyage should always notify the company of the name of the vessel and time of sailing, that the company may protect the interest of all concerned by re-insurance if made necessary by too large amount of risk on any one vessel.

Defendant admits that the premiums on this policy were paid up to July 15, 1876, and that ninety days before suit due notice of the death of Israel Ferguson was given to defendant.

Plaintiff's counsel also offers in evidence a deed of trust from Ellenora A. Ferguson, assigning the said policy to John J. Nestell.
40 The deed is admitted and marked "Plaintiff's Exhibit 2."

(This deed will be found attached to the complaint in the judgment roll hereinafter inserted, and marked "Plaintiff's Exhibit 3.")

Plaintiff's counsel also offers in evidence an exemplified copy of a judgment roll and judgment of the supreme court of the State of New York in an action in which John J. Nestell, as trustee under the deed of Ellenora

A. Ferguson, was plaintiff and Ellenora A. Ferguson and others were defendants, appointing the present plaintiff trustee in place of John J. Nestell removed. It is admitted and marked in evidence "Plaintiff's Exhibit 3."

The people of the State of New York, by the grace of God free and independent, to all whom these presents shall come or may concern, greeting:

Know ye, that we, having examined the records and files in the
41 office of the clerk of the county of New York and clerk of the supreme court of said State for said county, do find a certain judgment roll there remaining, in the words and figures following, to wit:

Summons.

[L. S.] Supreme court, county of New York.

JOHN JAY NESTELL, AS TRUSTEE UNDER THE deed of Ellenora A. Ferguson, plaintiff,
against
ELLENORA FERGUSON AND EMMA T. HART AS executrix, John Jay Nestell, George W. Hart, as executors, under the last will and testament of Joseph B. Hart, deceased, defendants.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within
42 twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated May 26, 1879.

ERASTUS F. BROWN,
Plaintiff's Attorney,
Office No. 76 Nassau street, New York City.

P. O. address: 76 Nassau street, New York City.

43 Supreme court, county of New York.

JOHN JAY NESTELL, UNDER THE DEED OF Ellenora A. Ferguson, plaintiff,
against
ELLENORA A. FERGUSON AND EMMA T. HART as executrix, John Jay Nestell, George W. Hart, as executors, under the last will and testament of Joseph B. Hart, deceased, defendants.

The plaintiff, John Jay Nestell, by his complaint, sets forth:

First. That on or about the 10th day of February, A. D. 1877, the plaintiff was appointed trustee by the defendant, Ellenora A. Ferguson, under a deed of trust, a copy of which is annexed, forming a part of this complaint, and marked "A" for identification.

Second. That the plaintiff accepted the trusts under said deed, but has not entered upon his duties as trustee, and has received no
44 moneys or other thing or things under said trust deed.

Third. That the only consideration of said deed were the trusts therein imposed and this plaintiff's acceptance thereof.

Fourth. That the plaintiff, for good and sufficient reasons, cannot perform the duties devolving upon him under said deed.

Wherefore the plaintiff prays that he may be allowed to resign, and that he may be relieved from the further duties of his trust under the deed aforesaid.

ERASTUS F. BROWN,
Attorney for Plaintiff.

CITY AND COUNTY OF NEW YORK, *ss:*

John Jay Nestell, being duly sworn, says that he is the plaintiff in the above-entitled action; and further, that the foregoing complaint is true, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

J. JAY NESTELL.

Sworn to before me this 26 day of May, 1879.

SAMUEL SCHUMACHER,
Notary Public, N. Y. Co.

45 This indenture, made this tenth day of February, A. D. 1877, between Ellenora A. Ferguson, of the city of New York, of the first part, and John Jay Nestell, of the same place, of the second part, witnesseth:

That the party of the first part, in consideration of the trusts hereinafter imposed and the acceptance of the same by the party of the second part, and in consideration of the sum of one dollar duly paid to the party of the first part by the party of the second part, the receipt whereof is hereby acknowledged, hath assigned, transferred, and set over, and by these presents doth assign, transfer, and set over, to the party of the second part a certain policy of insurance upon the life of Israel Ferguson, deceased, in favor of the party of the first part, for ten thousand dollars, issued by The Manhattan Life Insurance Company, of New York, known as number 12366, dated June 15th, 1864, and all moneys due and to grow due thereon upon the following trusts:

First. To pay over to Joseph B. Hart his claim upon said
46 moneys, amounting to two thousand dollars, with interest thereon from July 1st, 1874.

Second. To pay all necessary expenses incurred as counsel fees or otherwise in collecting said amount and interest of the insurance company aforesaid.

Third. To invest the balance of all moneys collected upon good and sufficient security, and to pay the income thereof to the party of the first part during her natural life, and such portion of the principal as the parties of the first and second part may deem necessary to be applied to the maint*ai*nance and support of the party of the first part during such time.

In witness whereof I have hereunto set my hand and seal the day and year first above written.

ELLENORA A. FERGUSON. [L. S.]

Witness:
THEO. P. ANDERSON.

Supreme court, county of New York.

47 JOHN JAY NESTELL, AS TRUSTEE UNDER the deed of Ellenora A. Ferguson, plaintiff,
against
ELLENORA A. FERGUSON AND EMMA T. HART, as executrix, and John Jay Nestell and George W. Hart, as executor', under the last will and testament of Joseph B. Hart, deceased, defendants.

Please to take notice that the above-named defendants appear in this action and that I am retained as attorney for them therein, and admit due and timely service of a copy of the complaint in said action.

Dated New York, May 26, 1879.

JOSEPH O. BROWN,
Att'y for Defendants.

Supreme court, county of New York.

48 JOHN JAY NESTELL, AS TRUSTEE UNDER THE deed of Ellenora A. Ferguson,
against
ELLENORA A. FERGUSON AND OTHERS.

The answer of the defendant, Ellenora A. Ferguson, to the complaint, by Joseph O. Brown, her attorney, shows to this court:

First. That said defendant admits the truth of the allegations in the complaint contained.

Second. That John G. Broughton is a fit and suitable person to take upon himself the duties of the trusts imposed in the deed in the complaint described.

Wherefore the said defendant prays that the renunciation of the plaintiff may be accepted and that he may be relieved from the further duties of his trusts under the deed in the complaint set forth, and that said John G. Broughton may be appointed the trustee under said deed.

JOSEPH O. BROWN,
Attorney for said Defendant.

49 CITY AND COUNTY OF NEW YORK, *ss:*

Joseph O. Brown, of said city, being duly sworn, says that he is the attorney for the defendant, Ellenora A. Ferguson, and that the foregoing answer is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he

believes it to be true. That this verification is made by the deponent for the reason that said Ellenora A. Ferguson is not a resident of this State, but resides in the State of New Jersey.

JOSEPH O. BROWN.

Sworn to before me this 26 day of May, 1879.

CHARLES HAGEDORN,
Notary Public, Kings Co.
(Certificate filed in N. Y. Co.)

I hereby consent to act as the substituted trustee under the deed of Ellenora A. Ferguson and agree to perform the duties of the trusts by said deed imposed.

Dated New York, May 27, 1879.

JOHN G. BROUGHTON.

50 STATE OF NEW YORK,
City and County of New York, ss:

On this 27th day of May, 1879, personally appeared before me John G. Broughton, known to me to be the same individual described in and who executed the foregoing consent, and he acknowledged to me that he executed the same.

WM. H. RIBLET,
Notary Public (*No.* 1.) *City and County of New York, 3rd ave. and 9th st.*

At a special term of the supreme court, held at the county court-house, in the city and county of New York, on the 27th day of May, 1879.

Present, Hon. Charles Donohue, justice.

JOHN JAY NESTELL, AS TRUSTEE UNDER THE deed of Ellenora A. Ferguson, plaintiff,
against
51 ELLENORA A. FERGUSON AND EMMA T. Hart, as executrix, and John Jay Nestell and George W. Hart, as executors, under the last will and testament of Joseph B. Hart, deceased, defendants.

The above-entitled action having been brought by the plaintiff for the purpose of being relieved from the further duties of his trusts under the deed of trust executed by the defendant Ellenora A. Ferguson to the plaintiff, and more fully described in the complaint in the above-entitled action; and all the defendants having appeared in the action and having consented thereto, and the defendant Ellenora A. Ferguson having by her answer prayed for the appointment of John G. Broughton as substituted trustee and all the other defendants having consented thereto, and said John G. Broughton having also consented in writing to act as the substituted trustee, and to perform the trusts under said deed: Now, on motion of
52 Erastus F. Brown, attorney and counsel for the plaintiff, it satisfactorily appearing to the court that all the material allegations in the complaint are true—

It is ordered that the resignation of the plaintiff be, and the same is

hereby, accepted; and it is further ordered in conformity with the prayer of the defendant Ellenora A. Ferguson, and the consent of all the other cestui que trusts, that said John G. Broughton be appointed as substituted trustee under the deed of Ellenora A. Ferguson aforesaid, to fill the vacancy now existing caused by the acceptance of the resignation of the plaintiff.

C. DONOHUE, *J.*

I hereby consent to the entry of above judgment.
Dated New York, May 27th, 1879.

JOSEPH O. BROWN,
Att'y for Defendants.

All which we have caused by these presents to be exemplified
53 and the seal of our said supreme court to be hereunto affixed.
Witness Charles Donohue, justice, at the city of New York the third day of April, in the year of our Lord one thousand eight hundred and eighty, of our Independence the one hundred and fourth.

[L. S.] WM. A. BUTLER, *Clerk.*

I, Charles Donohue, presiding justice of the supreme court of the State of New York for the city and county of New York, do hereby certify that William A. Butler, whose name is subscribed to the preceding exemplification, is the clerk of the said county of New York, and clerk of the said supreme court for said county, duly appointed and sworn, and that full faith and credit are due to his official acts.

I further certify that the said seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated New York, April 3, 1880.

C. DONOHUE, *J.*

54 STATE OF NEW YORK,
City and County of New York, ss:

I, William A. Butler, clerk of the supreme court of said State in and for the city and county of New York, do hereby certify that Charles Donohue, whose name is subscribed to the preceding certificate, is presiding justice of the supreme court of the said State in and for the city and county of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court this third day of April, 1880.

[L. S.] WM. A. BUTLER, *Clerk.*

Plaintiff's counsel then called John G. Broughton, who, being duly sworn, testified on behalf of plaintiff as follows:

I am the plaintiff in this action. I reside in Bloomfield, New
55 Jersey. I have resided there with my family nearly twelve years last past and voted there.

Being cross-examined by defendants' counsel, he testified as follows:

I am not connected with Mrs. Ferguson or her family by the tie of blood

to my knowledge. I am the person to whom this judgment refers—spoken of here as the substituted trustee. I don't know as I can tell the date when I was first applied to to become the substituted trustee here. It is about a year ago—hardly a year. Mr. Brown, the counsel, called on me and told me the facts in the case, and wanted to know if I would act as substituted trustee. After looking into the facts of the case, I told him I would.

Q. Why were you asked?

A. I don't know what he had in his mind.

Q. Was it not so that the suit might be brought in the United States court?

A. I suppose he wanted a good substitute.

56 Q. Was it not so that a suit could be brought in your name in the United States courts? Wasn't that the object as avowed to you?

A. That may have been one reason as well as I can recall. I have no interest in this controversy—none of it is to come to me that I know of. I don't know whether I am to be protected against any claim for costs in case of an adverse result. I don't know of anything having been said about that. There is nothing that I can now recollect, expressed or implied, on that subject as to who is to protect me in a judgment against me. I do not expect to foot the bill in case I am defeated. I suppose somebody will pay it. I don't know who. I don't know that I am to transfer the bill to anybody after the suit has been tried. I know nothing of that kind. In case of recovery at the hands of this jury of the amount sued for here, I suppose I am to have the money as trustee. Person-

57 ally, I am to derive no benefit from it, no commission or compensation that I know of. I am merely a nominal holder of the claim, as I understand it. I don't know of any new parties that have come into it as beneficiaries.

Being re-examined by plaintiff's counsel, he testified as follows:

You applied to me. I have been personally acquainted with you for about fifteen years. Our relations have been to an extent intimate.

And being questioned by the court he answered as follows:

I consented to become trustee for Mrs. Ferguson at the intercession of her counsel, Mr. Brown. Whether I am to have any commissions or not is a matter of which I have no knowledge. I rely upon my friend, Mr. Brown, to protect me in case of any defeat.

WILLIAM M. MILLS being next called by plaintiff's counsel and duly sworn, testified as follows:

58 I knew Israel Ferguson in his life-time. During the last year or two I was his partner in business. I know the fact of his death. I was present at the funeral and saw him in the coffin. I know that the man I saw in the coffin was Israel Ferguson. He left the office for the last time, the 14th of April, 1876. The next time I saw him was at the morgue at the foot of 23rd street. He was brought to the house on the following Tuesday, about the 16th or 17th, I don't know exactly the date. I was intimately acquainted with the family at that time, and with his widow, Ellenora A. Ferguson. I boarded with the family in 43rd street. I lived in Red Bank. After the death of Mr. Ferguson I returned to Red Bank.

Mr. Ferguson was about leaving New York here in May to go to Red Bank, New Jersey. He was not going to take the house here again in New York. He was fixing to move down to Red Bank at the time this occurred. The lease of his house in 43rd street would have ended
59 the first of May. After his death Mrs. Ferguson and the whole family went to Red Bank. In Red Bank the family lived in my house. The Ferguson family furnished the apartments occupied by Mrs. Ferguson. Mrs. Ferguson subsequent to this time came to New York. The children separated. They were sent to school, and the remaining son went to Boston, in business. Mrs. Ferguson at present resides in Red Bank, and has for the last year, in my house. She herself furnished the apartments. I could not tell exactly when she left the city and moved to Red Bank the last time, but the 5th or something or other of May, a year, very nearly ago. She has never been away from Red Bank since.

Being cross-examined by defendant's counsel, he testified as follows:

After Mr. Ferguson's death, which we have fixed at about the 14th or 15th of April, 1876, Mrs. Ferguson went with her family to my
60 house in Red Bank. Her family was then composed of three daughters and a son, young ladies and young gentleman. I was not connected at all with Mrs. Ferguson by relation or marriage or blood. Her going to my house was not a visit. She came with her family there to live. There was no agreement for any specified time. They had to vacate the premises they occupied the first of May. It was immediately after the first of May that the family went down with me to live at my house. No particular time was specified. The family lived in my house for about a year from May, 1876. Then the children were disposed of in that way. The son got a berth in the city under George Upton, and the mother then paid her sister, Mrs. King, up-town here, a visit. I could not tell you how long she remained up-town. Then, in April last, she returned home again. When she came back to me, in April, 1879, there was no contract or agreement between her and me as to time, nor as to rate of board. She came back about the 5th or 8th of April, and since that time she has not transacted any business; she is simply living
61 there as her home, occupying certain rooms in my house, in which she had her own furniture, which she brought from New York. I expected her to come back before she did come. When she came to the city I knew that she was not going to remain here, but was coming back.

Defendants' counsel admits the lady now spoken of to be the Ellenora A. Ferguson mentioned in the policy of insurance.

The plaintiff here rested his case.

And thereupon the defendant, by its counsel, moved for a dismissal of the action on the ground of want of jurisdiction in court, for that it appeared by the records read in evidence, and by the pleadings and proofs in this action, that the plaintiff herein was not at the time of the commencement of this action, nor since, a citizen of New Jersey, and it did appear that the controversy in this action was and is between citizens of the same State, to wit, the State of New York.

62 The court refused so to dismiss the action, to which ruling and decision of the court in refusing to dismiss the action as requested the defendant then and there, in open court, during the trial, duly excepted,

and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

Mr. HOYT then opened the case for the defendant, and being himself called and duly sworn, testified on behalf of the defendant as follows:

I am one of the attorneys for the defendant in this action. I was one of the attorneys for the defendant in this action when it was tried in the court of common pleas, and the plaintiff was Ellenora A. Ferguson. I attended that trial throughout.

Defendant's counsel thereupon offered in evidence an exemplified copy of a judgment roll and judgment of the court of common pleas for the city and county of New York in an action in which Ellenora A.
63 Ferguson was plaintiff and The Manhattan Life Insurance Company was defendant. It is admitted and marked in evidence—

DEFENDANT'S EXHIBIT A.

Court of common pleas for the city and county of New York.

ELLENORA A. FERGUSON, PLAINTIFF,
against
THE MANHATTAN LIFE INSURANCE COMPANY, defendant.
} Summons for a money demand on contract.

To the defendant above named:

You are hereby summoned and required to answer the complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber at his office, number 76 Nassau street, in the city of New York, within twenty days after the service hereof, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiff in
64 this action will take judgment against you for the sum of ten thousand dollars, with interest from the fourteenth day of July, one thousand eight hundred and seventy-six, besides the costs of this action.

Dated October 26, 1876.

JOSEPH O. BROWN,
Plaintiff's Attorney.

Court of common pleas for the city and county of New York.

ELLENORA A. FERGUSON
against
THE MANHATTAN LIFE INSURANCE COMPANY.

The complaint of the above-named plaintiff respectfully shows to this court:

First. That the above-named defendant is a corporation organized under the laws of the State of New York, engaged under the authority of law in the business of life insurance.

Second. That on or about the fifteenth day of June, 1864, in consideration of the payment by the plaintiff to the defendant of the annual pre-
65 mium of three hundred and twenty dollars, the defendant duly made

and delivered to the plaintiff their policy of insurance in writing upon the life of Israel Ferguson, and thereby insured the life of said Israel Ferguson in the sum of ten thousand dollars, payable to the plaintiff ninety days after the death of said Israel Ferguson.

Third. That the plaintiff was the wife of said Israel Ferguson.

Fourth. That on or about the fourteenth day of April, 1876, said Israel Ferguson departed this life.

Fifth. That all of the annual premiums have been duly paid as by said policy of insurance provided.

Sixth. That no part of the said sum of ten thousand dollars has been paid;

wherefore the plaintiff demands judgment against the defendant for the sum of ten thousand dollars, with interest from July 14th, 1876.

JOSEPH O. BROWN,
Attorney for Plaintiff.

CITY AND COUNTY OF NEW YORK, *ss:*

Ellenora A. Ferguson, the plaintiff in the above-entitled action,
66 being duly sworn, says: That the foregoing complaint is true of her own knowledge, except as to the matters stated on information and belief, and as to those matters that she believes it to be true.

ELLENORA A. FERGUSON.

Sworn to before me this 26th day of October, 1876.

STEPHEN H. KNAPP,
Notary Public (87).

Court of common pleas for the city and county of New York.

ELLENORA A. FERGUSON
against
THE MANHATTAN LIFE INSURANCE COMPANY.

The complaint of the above-named plaintiff respectfully shows to this court:

First. That the plaintiff is informed and believes that the defendant is a corporation carrying on the business of life insurance under the laws of the State of New York.

Second. That on the fifteenth day of June, 1864, the defendant
67 as aforesaid in consideration of the annual payment to it of three hundred and twenty dollars, executed to the plaintiff a policy of insurance on the life of her husband, Israel Ferguson, whereby it promised to pay to the plaintiff ten thousand dollars, within ninety days after notice and proof of the death of said Israel Ferguson.

Third. That the plaintiff had a valuable interest in the life of the said Israel Ferguson at the time of effecting the said insurance and also at the time of his death.

Fourth. That on the fourteenth day of April, 1876, at the city of New York, the said Israel Ferguson departed this life.

Fifth. That on the twentieth day of May, 1876, the plaintiff gave notice to and furnished the defendant with proof of the death of the said Israel Ferguson, and otherwise performed all the conditions of the said policy on her part.

Sixth. That the defendant has not paid said sum.

68 Wherefore the plaintiff demands judgment against the defendant for the sum of ten thousand dollars, with interest thereon from August 18, 1876, with costs.

JOSEPH O. BROWN,
Attorney for Plaintiff.

CITY AND COUNTY OF NEW YORK:

Ellenora A. Ferguson, being duly sworn, says that she is the plaintiff in the above-entitled action, and that the foregoing complaint is true of her own knowledge, except as to the matters stated on information and belief, and that as to those matters that she believes it to be true.

ELLENORA A. FERGUSON.

Sworn to before me this 13th day of December, 1876.

THEO. P. ANDERSON,
Notary Public, N. Y.

Court of common pleas for the city and county of New York.

ELLENORA A. FERGUSON
vs.
69 THE MANHATTAN LIFE INSURANCE COMPANY.

The defendant in this action, by its attorneys, Fellows, Hoyt and Schell, answering the complaint of the plaintiff herein:

I. Admits that defendant is a corporation organized under the laws of the State of New York, as in said complaint alleged.

II. Defendant admits that on or about the 15th day of June, 1864, it did issue a certain policy of insurance upon the life of one Israel Ferguson, partly of the substance and effect and partly of a different substance and effect from the policy in said complaint alleged, which contract and policy as set forth in said complaint this defendant denies and calls for the production of the original policy upon the trial of this action.

III. Defendant, further answering, says that it was and is expressly provided in and by the terms of said policy of insurance, among
70 other things, that in case the said Israel Ferguson, the assured, should die by suicide, then the said policy should be null and void and of no effect; and this defendant alleges, on information and belief, that the said Israel Ferguson did die by suicide, to wit, at the city of New York, on or about the 14th day of April, 1876, and that his death in said complaint alleged was by suicide.

IV. Defendant denies each and every allegation in said complaint not hereinbefore expressly admitted.

V. Defendant, for a further and separate defence in the nature of a counter-claim, alleges that the said Israel Ferguson, at the city of New York, on or about July 15th, 1864, made and delivered to defendant his certain promissory note in writing, bearing date on that day, whereby he promised to pay, twelve months after date, to the Manhattan Life Insurance Company, or order, the sum of one hundred and sixty dollars, with interest payable yearly in advance.

71 That the said Israel Ferguson, at the city of New York, on or about the 15th day of July, 1865, made and delivered to the defendant his certain promissory note in writing, bearing date on that day, whereby he promised to pay, twelve months after date, to the Manhattan Life Insurance Company, or order, the sum of one hundred and sixty dollars, with interest payable annually in advance.

That the said Israel Ferguson, at the city of New York, on or about the 15th day of July, 1866, made and executed to defendant his certain promissory note in writing, bearing date on that day, whereby he promised to pay, twelve months after date, to the Manhattan Life Insurance Company, or order, the sum of one hundred and sixty dollars, with interest payable yearly in advance.

That the said Israel Ferguson, at the city of New York, on or about the 15th day of July, 1867, made and delivered to defendant his certain promissory note in writing, bearing date on that day, whereby he

72 promised to pay, twelve months after date, to the Manhattan Life Insurance Company the sum of one hundred and sixty dollars, with interest payable annually in advance. That none of said notes nor any part thereof has been paid, and defendant claims the amount thereof with interest as aforesaid should be deducted from the amount of said policy.

Wherefore defendant demands that said complaint be dismissed with costs.

FELLOWS, HOYT & SCHELL,
Def't's Att'ys.

CITY AND COUNTY OF NEW YORK, *ss:*

Henry Stokes, being duly sworn, says that he is president of the defendant in this action; that the foregoing answer is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

HENRY STOKES.

Sworn to before me this 1st day of December, 1876.

JOHN C. HICKIE,
Notary Public, N. Y. Co.

73 (Endorsed:) Court of common pleas. Ellenora A. Ferguson vs. The Manhattan Life Insurance Company. Answer. Fellows, Hoyt & Schell, def't's att'ys.

Due and sufficient service of a copy of the within answer is hereby admitted.

Dated December 1st, 1876.

JOSEPH C. BROWN,
Att'y for Pl'ff.

It is hereby stipulated that the within answer stand as the amended answer to the amended complaint in this action, and due service thereof is hereby admitted, this being the original answer served.

Dated New York, December 18, 1876.

JOSEPH O. BROWN,
Att'y for Pl'ff.

Court of common pleas for the city and county of New York.

ELLENORA A. FERGUSON
against
THE MANHATTAN LIFE INSURANCE COMPANY.

The reply of the above-named plaintiff shows to this court that she denies that she has any knowledge or information sufficient to form
74 a belief as to the allegations in the answer constituting a counter-claim.

JOSEPH O. BROWN,
Attorney for Plaintiff.

CITY AND COUNTY OF NEW YORK, *ss*:

Ellenora A. Ferguson, the plaintiff in the above-entitled action, being duly sworn, says that the foregoing reply is true of her own knowledge, except as to those matters stated on information and belief, and as to those matters that she believes it to be true.

ELLENORA A. FERGUSON.

Sworn to before me this 12th day of January, 1877.
THEO. P. ANDERSON,
Notary Public, N. Y.

WEDNESDAY, *December 4th*, 1878.

S. O. Brown.

ELLENORA A. FERGUSON
vs.
THE MANHATTAN LIFE INSURANCE COMPANY.

Fellows, H. & S.

Counsel for defendant claimed the right of challenge to each juror
75 when called, and ascertain their competency to act as juror in the above action. The following-named jurors were empannelled and sworn: Louis P. Siebert, Joseph I. Adgate, Julius Bowman, Napoleon B. Phelps, John D. Wienholz, Charles H. Benson, William I. Surre, Henry J. Lane, Philip C. Klein, Solomon Brodek, Charles C. Ambracht, Robert M. Lang.

Plaintiff's evidence:
Erastus F. Brown, John J. Nestell, William Mills.
Plaintiff rests.

Defendant's evidence:
Robert D. Murphy, Edwin T. P. Marsh.
Defendant rests.

Plaintiff moves for verdict. Denied.

Rebuttal:
William Sherwood, James R. Cuming, William Mills recalled.

Pending further testimony court adjourned until 11 o'c. a. m., to-morrow.

NATHANIEL JARVIS, JR., *Clerk.*

76 THURSDAY, *December 5th*, 1878.

Court opened pursuant to adjournment.
Present, Hon. R. L. Larremore.

FERGUSON
vs.
MAN. LIFE INS. CO. } Cause continued.

Jurors all present.
Plaintiff's rebuttal:
John N. Kaster, John C. Southwick, Catherine Cook, Nellie Ferguson, Ellenora A. Ferguson, Alfred W. Walker, George Haffner, Charles Corey, M. D.
Motion for non-suit granted, and complaint dismissed; allowance, one hundred and fifty dollars to defendant, if further litigation be carried on by plaintiff. (Extract of minutes.—NATHANIEL JARVIS, JR., *Clerk.*)

Court adjourned until 11 o'c. a. m., to-morrow.
NATHANIEL JARVIS, JR., *Clerk.*

77 *Judgment—Dec.* 17, 1878.

Court of common pleas for the city and county of New York.

ELLENORA A. FERGUSON
vs.
THE MANHATTAN LIFE INSURANCE COMPANY.

This action having been brought on for trial before Hon. Richard L. Larremore, one of the justices of this court, and a jury, at a trial term of said court, held on the 4th and 5th days of December, 1878, at the new court-house, at the city and county of New York, and the said justice, upon motion of defendant's counsel, having granted a non-suit and dismissed the complaint herein, now, on motion of Fellows, Hoyt & Schell, attorneys for defendant, it is ordered and adjudged that the said defendant have judgment of non-suit and dismissal of the complaint in this action against the said plaintiff, and that the said defendant, The Manhattan Life Insurance Company, recover of the said *defendant*, Ellenora
78 A. Ferguson, the sum of one hundred and fourteen $\frac{90}{100}$ dollars ($114.90), its costs and disbursements of this action as adjusted, and the further sum of one hundred and fifty dollars ($150) allowed by the court in addition to costs, as per minutes.

NATHANIEL JARVIS, JR., *Clerk.*

STATE OF NEW YORK,
City and County of New York, ss:

I, Nathaniel Jarvis, Jr., clerk of the court of common pleas for the city and county of New York, do hereby certify that I have compared the foregoing judgment roll, each with the original thereof, on file in my office, and that each is a correct transcript of the original with which it was so compared, and of the whole of said original.
In witness whereof I have hereunto subscribed my name and affixed the seal of said court this 13th day of December, 1879.
[L. S.] NATHANIEL JARVIS, JR., *Clerk.*

(Endorsed:) Court of common pleas for the city and county of New
79 York. Ellenora A. Ferguson against The Manhattan Life Insurance Company. Judgment roll. Fellows, Hoyt & Schell, attorneys for defendant, 158 Broadway, N. Y. C. $264.90. Filed Dec. 17, 1878, at 1 o'c. m.

Mr. Hoyt then further testified as follows: Upon that trial the plaintiff offered the policy in evidence, and proved on it a prima facie case, proved death and interest in policy, and rested. Then the defendant proved that the insured had committed suicide and the manner of his death, and then rested. Then the plaintiff offered evidence of his acts and conduct and appearance during some time previous to his death, and offered expert testimony to show insanity, and then rested. Then a motion was made to the court by the defendant for a dismissal of the complaint on its merits. That was discussed at great length by counsel on both sides and by the court,
and the result was the judgment that has been read. Defendant's
80 counsel admits that a motion was made to have the words "on the merits" inserted in the minutes, and that Judge Larremore said "Let it stand as it is."

Witness continues: The only evidence introduced on the question of insanity was by the plaintiff. This judgment remains in full force and effect, never having been appealed from, modified, nor satisfied.

Defendant's counsel then offers in evidence, from the minutes of that trial, the decision of the court therein.

It is admitted and marked "Defendants Exhibit B," and is as follows:

"The onus probandi is on the plaintiff to show that he (the deceased) had not mind enough left to know that death would result from the act he was about to commit. You have got to make that out. When you make a policy, one of the provisions of which is that you cannot recover when a man dies by his own hand, then the only way you can recover is to show
that the man was insane. The only way you can make that out is by
81 showing a totally abnormal, crazy condition of the mind, so that he did not know the physical consequences of the act. The facts of this case all might exist with the entire sanity of any individual. You have grouped all the facts together, and tried to show from that that the man was insane. That is not the kind of insanity the law contemplates. The law says you can take out a policy, provided you do not die by your own hand, and if you die by your own hand your relatives must make out a prima facie case that death resulted from an act committed while the party was insane; not from any impulse, but that the man was actually insane and had not mind enough to know what he was doing. It is a case of peculiar hardship, but it has been tried with great fairness on the part of the defence, and with great liberality.

"PLAINTIFF'S COUNSEL. I have to request that the case be submitted to the jury on the evidence in the case.

"The COURT. I deny your motion to have the case submitted, and
82 grant the motion for the non-suit.

"Plaintiff's counsel excepted."

And thereupon the defendant, by its counsel, moved for a direction of a verdict for the defendant upon the ground of the former judgment in the court of common pleas.

The court refused to grant the motion.

To which ruling and decision of the court refusing to grant the motion for a dismissal of the complaint on the ground of the previous adjudication, the defendant then and there in open court, during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

83 ROBERT D. MURPHY, being next called and duly sworn, testified on behalf of the defendant as follows:

In April, 1876, I was a policeman in Central Park. I was on duty on the east side of the park from 72nd to 86th streets; I saw the body of Israel Ferguson in the park in the month of April; I cannot positively say what date it was; I forget now; it was somewhere about the middle of the month; I never kept any memorandum of it; I found his body hanging to a tree on the southeast corner of the old reservoir wall, right over the transverse road at 79th street, at about five minutes to 8 o'clock in the morning; I cannot say how I came to see him; about that time it was generally my rule to go over my post—that is, the walks; I was to go through all the different walks and see if there was anything there that was not right; as I came along to the transverse road where the walk joins the drive I stopped a moment and there was something urging me to go up the walk a
84 very short distance ahead, and I did go up there, not thinking about anything of that kind, and I noticed a man hanging or standing in the bushes; I could not think what it was about, or who it was, or anything else; I went right into the bushes and opened them out, and I there saw this gentleman, Mr. Ferguson, hanging by the neck to the limb of a tree; it was a white pine tree; the body was just as close to the trunk of the tree as it possibly could be; the nose was so pressed that it flattened the nose somewhat, and the two arms were extended on the limbs right beside him, and a handkerchief went around his throat, and then he stood upright with his two elbows resting on these limbs, and at his feet was a round stone which was kicked a little to the right of his toes; his toes were about that length (indicating) on the ground; the handkerchief seemed to be a pocket-handkerchief, for I found none on his person; it was a linen handkerchief torn in three parts, and each end knotted together, and one end was tied around the limb of the tree immediately over
85 his head; he was hanging suspended from that handkerchief; the knot around his neck was what we call a running knot. I had been a policeman on duty in the park for some time; it is a very hard thing to get a loose stone in the park unless it is along the gutter, or unless there are loose paving-stones, and it is very hard to get them; he could have brought the stone from the 8th avenue, or the 5th avenue, or the Museum of Art; the Museum of Art was the nearest; it might be two blocks away. I pushed through the bushes and trees to get a better view; the place is just an angle—something like that (indicating); the old reservoir wall runs north that way, and west on this side, and the man was here; the way I stood down on the drive there is a walk that is right up to here, which goes along down this way to the park, and here was some trees; I never counted them and don't know how many there were, but
86 this white pine was there; you might pass the place accidentally a good many times before you noticed anything in them except your attention was called to something; the body was cold at that time; I cut

him down and brought him to the station-house, and they found on his clothing a revolver and a razor, and a large wallet containing a number of bills that were paid and papers of that description. I took the body to the morgue and likewise these papers and all that were found on his person, and got a receipt for it and brought it back to the station-house. He had a knife and a razor and a revolver, and a five-cent nickel piece was all the money he had; he had a comb; I didn't notice all there was; there was no pocket-handkerchief on his person but the one he was hung with.

Being cross-examined by plaintiff's counsel, he testified as follows:

I came there in the morning at six o'clock. When I found the body it was cold. His arms were not resting on the same limb he was hanging to. He stood in between two limbs. The limb he hung himself
87 from was a higher limb. It was one of those white pine trees, with limbs all along. He was no way disfigured in the least. His eyes were closed, and his mouth, and he looked quite nice. A laboring man was there when I cut him down. As soon as I loosed the knot he fell right back on the man's arms. I could not tell you how large the limbs were that his arms rested on. I never noticed how large they were, but the one that he hung himself on was large enough. He lay right so (indicating), as if he was comfortable. His body fell right backwards when I cut the string. I could not say now whether the limbs were large enough to support him by the arms. I did not take particular notice. I had no interest in anything of the kind. I saw only the general facts. That is all.

Defendants' counsel then read in evidence to the jury the deposition of Dr. Edward T. Marsh, as follows:

I am a physician and surgeon of the Central Park police. I
88 remember on or about the 15th day of April, 1876, at the morgue, seeing the body of Israel Ferguson and examining it. At that time I was deputy coroner. I gave as the cause of death asphyxia from hanging. From the history of the case, and the circumstances I found upon the body, from all the information and examination I could get, that was the cause of death, in my opinion.

Plaintiff's counsel then admitted that there are four notes, dated July 15, 1864; July 15, 1865; July 15, 1866, and July 15, 1867, respectively, each for $160, the total of which, with interest, amounts $832.88, and is to be deducted from any amount which may be recovered by the plaintiff on this trial.

ERASTUS F. BROWN, being next called and duly sworn, testified on behalf of the defendant as follows:

Q. Was the suit in the supreme court in which you have put in the judgment roll of Mr. Nestell, as trustee, commenced by your direction on your own motion?

89 A. Allow me to look at the paper.

(Counsel hands paper to the witness.)

Q. Did you institute that suit of your own motion?

A. No, sir.

Q. (By the COURT.) Did you suggest commencing such a suit?

A. No; I had conversation with my client, John J. Nestell, with regard to this suit.

Q. (By COUNSEL.) You can answer the judge's question directly, whether you advised the institution of this suit.

A. I was directed and guided by Mr. Nestell in this matter.

Q. Previous to that?

A. In bringing the suit.

Q. But previous to that had you directed such a thing?

A. I will say that the first conversation I had with Mr. Nestell was in regard to bringing this action, and his conversation with me at that time resulted in my (as his attorney) instituting suit.

Q. Now, you can answer my other question: Then was your object, purpose, and intention by that method of proceeding to get the title to
90 this claim in the hands of a citizen resident in another State?

WITNESS. I object.

The COURT. It is competent.

Q. Now, brother Brown, wasn't that the entire idea—the intention, to get it into the United States court?

A. In part, it was.

Q. Did you procure Mr. Joseph O. Brown, the attorney for the defendants, to appear for the defendants?

A. No, sir; I did not, for the reason that he was acquainted with the parties and acted——

Q. (Interrupting.) He was attorney in the old suit in the court of common pleas.

A. He was.

Q. He was attorney for Mrs. Ferguson?

A. Yes, sir.

Q. You were counsel?

A. Yes, sir.

Q. Mr. Nestell was your last client?

A. He was my client when I commenced to act for him in this matter.

Q. Before the suit in the supreme court?

A. I think before the suit in the supreme court. My brother, Joseph O. Brown, had attended to several matters before him.

Q. Your brother and you had your offices together?

91 A. Yes, sir; on the same floor, but not in the same rooms.

Q. Your rooms communicated?

A. Yes, sir.

Q. You did not procure him to appear for the defendants?

A. He appeared of his own motion.

Q. Had that matter been the subject of consultation and determination between your brother and you before the suit was commenced; that he should appear for defendants, and you for the plaintiff?

A. No, I think the matter was fully consummated between myself and my client, Mr. Nestell, before my brother came in the matter.

Q. (By the COURT.) The suit was brought as a friendly suit, was it not?

A. Yes, sir.

Q. (By the COURT.) There was no way of getting a trustee removed and another one appointed in his place except in this way?

A. That is the fact of the matter. I advised my client that the only way to step out was to go to the supreme court. I had several

92 other cases where my view of the law was sustained, as in the Brennan suit, where the court said it was the only way a trustee could step out.

Q. I see that Mrs. Ferguson, in her answer, suggests Mr. Broughton.

A. No, sir; she prays Mr. Broughton to be appointed.

Q. It does not appear, so far as the record shows, that the matter was brought to the attention of the supreme court that the trustee to be substituted was a resident of another State. Was that brought to the attention of the court in any way?

A. I appeared before his honor Judge Donohue at special term, chambers, in the morning early, and I submitted the papers to him. His honor retained them, and in the latter part of the day I called up and received them from the clerk.

Q. That is the sum and substance of that matter?

A. That is the sum and substance. I waived my fees.

And thereupon the defendant rested its case.

And the plaintiff then called JAMES R. CUMING, who, being
93 duly sworn, testified on behalf of plaintiff as follows:

I am a member of the firm of Vanderpool, Green & Cuming, attorneys and counselors at law. I was acquainted with Mr. Israel Ferguson in his life-time. My acquaintance with him commenced about eight years previous to his death, and was mostly social. Mr. Ferguson and I belonged to the same church, and I had in that way a very considerable acquaintance with him, meeting him week after week; and I have also had the pleasure of visiting him at his house. The man was of a naturally cheerful disposition, a bright, hearty man; walked erect ordinarily, with a clear, open face and a cheerful greeting for his friends whenever he met them. That was one of the special characteristics of Mr. Ferguson—and to come forward and grasp your hand cheerfully and heartily. He had usually some lively remark or cheerful sally to make, a friendly word, and while he was not talkative yet he was a man who
94 had always something to keep up the conversation with when you met him, and was, in short, a man you would speak of as a jolly, cheerful, hearty man. That was my first impression of him, and that was the character of his manner and outward appearance, so far as I could gather from the first five or six years of my acquaintance with him. He was somewhat my senior; I think he must have been then about forty years of age; this is only a guess I am hazarding. I noticed during the latter part of my acquaintance with him a very decided change in his manner and acts. I first noticed the change some time about the end of 1874, during the year 1875. When I met him then he usually—always, I think—was walking with his head bowed down, and a gloomy expression, and the entire vitality and cheerfulness which the man had before was gone. He spoke, when he did speak, of depressing things; I think once or twice he spoke of the death of his son, who had died suddenly by falling from a window; of his business losses; of the calamity which had come upon his family,
95 having to give up his nice, comfortable house which he had in 43rd street—the same street in which I live—and go and take a tenement on the opposite side of the street; and his having lost his health, and, in short, everything was against him, and there was nothing in life worth

living for. And I cannot enter with more particularity upon the change in his manner than that, I think. I think that is about all I can give. It appeared to me a radical change. I think on one occasion he wept in my presence. Now that you recall my attention to it, I think I can say positively that he did.

Being cross-examined, he testified as follows:

Mr. Ferguson, when I first knew him, was a genial, good-natured, frank sort of a man, of that peculiar temperament—sanguine temperament. He was about five feet nine or ten inches tall and well filled out. He had not a florid complexion, but a healthy complexion. I should not say
96 he was what one would call an emotional man at all. He was a man distinguished by great practical common sense, and usually when there was a charity needed he was the first man to put his hand into his pocket and see that it was attended to. He didn't go around with a subscription paper to see what others would give. I did not know him in business, except in the most casual manner. I have seen him down in the swamp doing business. I was not his legal adviser, and had no business connection with him. I got no knowledge of him except what I got from himself. I heard of supplementary proceedings, and things of that kind, showing that the man's financial state was very low. Before or while I first knew him I understood he was a man doing well for himself. He lived in a comfortable house. He spoke at last of having been compelled to reduce his household expenses, and also of his son's death. He had an office down town in the swamp, and I think his business was chiefly in such hair as is used by builders. He was engaged in that.

97 WILLIAM SHERWOOD, being next called and duly sworn, testified on behalf of plaintiff as follows:

I am a merchant carrying on business in Ferry street, in this city. I am engaged in the leather business. I was acquainted with Mr. Israel Ferguson in his life-time; my acquaintance with him began somewhere between 1830 and 1840. I was in daily intercourse with him. He began working for me somewhere between 1840 and 1850, and worked for me a number of years. As a man he was social, jovial, rather a demonstrative man, a good-feeling man, always ready to shake hands and have a joke or a pleasant word; that was the general character of the man. There was a marked change took place in his demeanor the latter part of his life. I could not say with any degree of positiveness when it commenced. He appointed our office as a place for persons to call on him, and they came there, and from time to time he would come there once a week, and
98 a great many callers reported that he had an office there; that he told them so. My opportunities of seeing him were in the store when he came down to the swamp. When he came there he was gloomy, dull, mopish, never had any change about him at any time. He would express himself in various ways about his being poor and needy, about his loss of property, and his business having all gone away. He had forty or fifty thousand dollars at one time and lost it all; that is, I suppose, about the estimate. T. P. Howell, in William street, offered him that for some property he had up-town. I have no remembrance of noting his weeping. He sat down in the office and moaned and would be gloomy there. I have no especial recollection of any expression beyond what I have said about his losing his property. He lost his manhood, and felt so.

Being cross-examined, he testified as follows:

99 The period of time I am now speaking of was the latter part of the period; I didn't jot it down at all; I would rate it just as you would. The panic struck us in 1873, and depreciation of values commenced then. He was engaged in a branch of business that builders use largely; it was hair. He spent a great deal of money in erecting a place to carry it on. The building trade fell through, and he could not dispose of his property; it had no value. That is one of the ways he lost his property, the shrinkage of value, &c. It was after the panic of 1873; it was after his losses were sustained. I learn here that it was in April, 1876, by that young man's testimony.

Q. You saw him how often; once a week, at least?

A. If you should ask me how often I see my neighbors in Ferry street, I could tell you just the same. If you should ask me how often I see John Southwick, I could not tell you.

Q. Did he make that a stopping-place—write his letters at your office, or get his letters there?

100 A. No; of course if he came in and asked to write a letter, he could do so. He had no regular business place there. We sat together in the office only as he would come there and stop a while. He was a young man that had been brought up in the family, and I liked him. He was a good, growing man—prosperous, good digestion; as strong a man as you are. He had good digestion and felt good. Of course I heard of his death at the time. I could not tell you how long previous to his death I had seen him, whether a week or a month, because I made no record of his stopping there. Probably I was at his house once in ten years. He lost his money some time after the panic of 1873, probably. I heard that he afterwards lost his son. I think that it was subsequent to the loss of his property. I presume that he never regained his fortune; he didn't that I know of.

GEORGE UPTON, being next called and duly sworn, testified on behalf of the plaintiff as follows:

101 I am a merchant carrying on business in Boston and Peabody, Massachusetts. I think about 1867 was when I first knew Israel Ferguson. My relations with him were entirely business relations; that is, they commenced on business relations, and I liked the man so much that I got rather social. I noticed a gradual change in the man from time to time as I saw him. He was in the hair business and I was in the same line in Peabody and Boston. I came to New York in 1867, I think the early part of the year, and saw him in Ferry street. I wanted to sell hair and was directed to go to Mr. Ferguson. I should state that at first on seeing him he struck me a man right up sharp for business. He had an answer as ready as you could put the question. My transactions with him were large up to 1873, and there is one time I would like to mention where I made a contract, in the beginning of the year 1872. I would like to mention it to show what a stalwart man he was. The contract came

102 to several thousand dollars for the year. Before the year had gone out—six months—the price of hair went down half. The contract was verbal, and instead of doing as some men might have done, he kept right up to the contract. I found him at an early period a straight-

forward business man. His manner was, as I say. He was prompt and decisive and ready with his answers, and always seemed to feel well until his son died, or about that time. Previous to that he lost his property and was considerably depressed. I always made it a point, whenever I came to New York, to send for him to see me, and when his business was so depressed I offered to let him have goods. Previous to the death of his son he lost a great deal, if not all of it, and that depressed him materially. When I saw him after the death of his son I noticed a great change in him. He seemed to dwell upon the state of his son entirely, and as if his business was all gone, and he didn't know what he should do, and I used
103 to see him every two or three months when I came on, and I noticed the gradual depression. I think some six weeks before his death I sent for him to meet me at the Grand Union previous to my going to Boston that night, and we sat down and had lunch, and I noticed then he looked to me as if he had no business in him at all. I sent to him to meet me at this locality, and he met me by appointment about an hour before the train went. We sat down and had some oysters. I asked him what he would have from the bill of fare, and he did not seem to know.

And thereupon the defendant by its counsel objected to the witness stating how he seemed, and on the witness being further asked—

Q. How did he act?

And answering—

A. Absent-minded and had no conversation at all.

Moved the court to strike out said answer and that part of the testimony stating how the deceased seemed to witness.

104 The court refused to grant the motion; to which ruling and decision of the court in refusing to grant the said motion the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

The witness then further testified as follows:

Previous to those interviews I had always said "Ferguson, when you want any hair you can have it, and pay me when you get ready." He would always say he didn't know but pretty soon there would be an opportunity. He did not give me any definite reply, or say anything.

And being cross-examined, he testified as follows:

I am still doing business in Massachusetts. I was not a witness
105 on the last trial of this action. I should judge that Mr. Ferguson lost his property somewhere about 1874.

JOHN C. SOUTHWICK, being next called and duly sworn, testified on behalf of the plaintiff as follows:

I am a member of the firm of Schultz, Southwick & Co., and am in the leather business in Cliff street. I knew Israel Ferguson in his life-time very well. I noticed a change during my acquaintance with him. I saw him, I should say, six months or so, perhaps a year, before his death. I can't recollect the exact time. I used to meet him every day all this time to which I refer—I forget whether it was in Cliff street that I met him or in Ferry street. I met him one morning and said "How are you, Israel?" He said "I'm all right. We've got 'em now" (imitating ges-

tures), and rushed across the street and ran away from me. I noticed in my early acquaintance with him that he was talking to himself often. I suppose he was talking, his lips were moving. I should say this was from six months to two years before his death. It may have been a year or a year and a *year and a* half; I cannot recollect; I did not take any memorandum. I was going up Cliff street and said "How are you, Israel?" and he said "I'm all right. We have got 'em now," and ran across the street. I used to see him every day for fifteen or eighteen years. I thought it was queer, of course.

106

Being cross-examined, he testified as follows:

I think that the business of Mr. Ferguson, in the last year of his life, was the hair business. Formerly, when I was first acquainted with him, he had been an inspector of leather in our firm, and an active business man. The hair business did not bring him into communication with me at all. I used to see him every day, though. I had no social acquaintance with his family, and did not visit him at his house. I did not know what he referred to when he used the expression "We have got 'em." I had no conversation with him subsequent to that. I cannot swear to having seen him. Subsequently I used to see him every day, just as I would merchants in the Swamp.

107

GEORGE HAFNER, being next called and duly sworn, testified on behalf of plaintiff as follows:

I knew Israel Ferguson in his life-time. I was employed by him from 1859 for about fourteen years, I think, steady up to the time of his death. I noticed a change in Mr. Ferguson. It commenced about after the business loss, and then a greater change was noticed after the death of his son, John, who died in 1874. That was his eldest son. After the death of his son he acted as if he had his senses lost. Before this change took place he was an industrious business man. Every morning he came to his business when he was in the leather business, and came down town to the hair business, and inquired into the business and saw how it was going on, and attended to his business regularly. Was always cheerful, too. After the loss of his property, and the loss of his son John he acted careless; didn't mind anything any more; didn't even take notice of the men around him, and I often saw him in his office walking back and forth, leaning his head on the desk. One time I asked him, "Mr. Ferguson, what is the matter?" He says, "My head, my head, my head is all wrong," he says.

108

Being cross-examined he testified as follows:

I do not understand just every word that is said to me. If there come some heavy words, it is hard to understand. I am a German by birth. My knowledge of the English language is not perfect—not like people who have been brought up here. I recollect that I was examined on the former trial. At the time that I refer to, that he was walking about, that was in 39th street at 11th avenue, at a place where building materials were sold. He had an office there, and a little yard. His son was in business with him. As to his having any other partner there, I did not know anything about his business affairs that way. I did

109

not know anything more than that Mr. Ferguson owned the business. This that I have been telling about was in 39th street, the day before his death. I could not say just the time, but it was a short time before his death. It was not six months before, but I could not tell. It was a short time before. I saw him several times. I don't know whether he had a partner. I know Mr. Mills; I was in his employ. I cannot say whether Mr. Mills was a partner, because I did not see the books. Mr.
110 Mills always used to be there, and Mr. Ferguson's son. There was no body there when I saw him lean his head against the desk; it was some time in the forenoon. He did not keep the books six months before he died; his son kept them He walked about, came in sometimes, and then walked out again; I did not know where he went. He sold goods to customers, and filled orders there in the place. I done the iuside sales that were done in the yard; Mr. Ferguson made the sales there when I was out. He always looked very sharp after his business up to the time of the death of his son.

ELIZABETH FERGUSON, being next called and duly sworn, testified on behalf of the plaintiff as follows:

I am the widow of John Ferguson, deceased, the son of Israel Ferguson; my husband died August 22nd, 1874; he had been troubled with heart disease, I think, but he died from an accident; he had so
111 much worry about his business trouble, and I think also about his father, that it brought on the heart trouble, and one night he went to bed as usual, although complaining very much about his heart, and got up and went to the window and fell, and his father heard the fall, and we got him upstairs immediately, and he lived until six o'clock. He fell from the open window down into the area. He did not fall on his face; he lay on the back of his head and back; his head was bruised and his shoulders. I was living at the time with Mr. Israel Ferguson; we went to live with him after the business trouble.

Q. Please state to what extent you know that Mr. Israel Ferguson depended upon your husband in the carrying on of the business.

(And thereupon the defendant, by his counsel, objected to the question. The court overruled the objection, to which ruling and decision
112 of the court in overruling the objection and allowing the question to be answered, the defendant then and there, in open court during the trial, duly excepted and prayed that its exception might be allowed by the court, and made a part of the record of the case, which was done and ordered accordingly.)

A. My father-in-law depended entirely upon his son in the selling of the hair; my father-in-law I don't think had done any of the selling while my husband lived; he sold at exchange down town. About two months after the death of my husband, I left the family and went to live with my own father and mother. During the time I was living with my father and mother, I called frequently to see the family; I always saw Mr. Ferguson; I always asked him how he was, and he always complained of his head; he would say "The trouble is here; it is all in my head, my head."

Being cross-examined, she testified as follows:

113 These visits to my father-in-law after I had left there were sometimes in the evening, and I think always late in the afternoon, and

I usually stayed to tea. It was always at the house that I saw Mr. Ferguson. I was with them when they changed their residence the first time; they changed to an upper floor after I left them. This was after they changed to an upper floor. When I went to see them it would usually be about five o'clock. I saw him after he came home from business. There had been no other changes in the family after I left; the rest of the children remained at home.

GEORGE W. FOX, being next called and duly sworn, testified on behalf of the plaintiff as follows:

I reside at Harlem, in the city of New York. I was acquainted with Israel Ferguson about five months before his death, I should think. When I first got acquainted with him, or shortly afterwards, I had a slight conversation with him at one time, in his office in 39th street, and
114 there he spoke about his former business arrangements, and he talked about matters and things generally, times, &c., and he asked me if I thought there was going to be an improvement in times, and I told him at that time that I did not think there would be, from the indications. He then spoke about his former times—how prosperous he had been in the leather business, and how smart he had been as an expert in leather matters. That is about the substance of that conversation as near as I can recollect now. I saw him several times afterwards, but did not like to go into his office. He walked up and down, and did not seem to wish to have any conversation.

(And thereupon, the defendant, by its counsel, objected to the witness stating how he "seemed," and moved to strike out that part of his testimony. The court refused to grant the motion; to which ruling and decision of the court in refusing to grant the motion to strike out that part of the
115 witness' testimony in which he stated how the deceased seemed, the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed and made a part of the record of the case, which was done and ordered accordingly.)

The witness then continued as follows: I met him at one time in Central Park. I was going through the park at one time, and right at the west side where the bridge crosses there, on the banks of that pond—it was an open winter; I often used to walk down. I saw him there by accident; he was standing there at the little bluff, right at the foot-path that runs along the east side of that pond, and he stood there in this position (indicating it), looking vacantly down.

(And thereupon the defendant, by its counsel objected, to the word "vacantly" and moved to strike it out.

The witness thereupon, explained to the court that he meant to
116 say that he had a vacant expression on his face. And the court refused to grant the motion to which ruling and decision of the court in refusing to grant the motion to strike out the word "vacantly" the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.)

The witness then continued as follows: That was when I first noticed him. He was standing in this position, and I went up and touched him as I passed him. I stepped to one side of the foot-path and touched him

gently on the shoulder, and he turned around rather queer, and said "Hullo!" but said nothing further. I asked him if he was going down to his place of business, as I was going that way. He did not reply immediately, but finally said: "No; not just yet." "Well," said I,
117 "good day," or I was about to say "good day," when he said, "Don't say anything that you saw me here. I will be down bye and bye." I should judge that this was about two months before his death.

CATHARINE COOK, being next called and duly sworn, testified on behalf of plaintiff as follows:

I have known Mr. Israel Ferguson since 1862. I was not engaged in his family. My husband used to work for him years ago. I saw Mr. Ferguson, I think, two weeks before his death. I seen him from 38th street and 9th avenue. I was in the grocery store buying my groceries. He was just crossing the 9th avenue; I was behind him. I was a few steps behind him, and I saw him talking to himself, and he shook his hands about, and he walked all the way down 38th st. to the 10th avenue, and I walked always behind him and noticed what actions he made, for
118 I never seen that before on him. As I came down on the 10th avenue I stood my basket down, and he crossed the 10th avenue over to 39th street, and I looked after him as far as I could see him—always making motions with his hands and his head—and he walked down 39th street, and I did not see him any more afterwards. I was behind him all the time.

NELLIE FERGUSON, being next called and duly sworn, testified on behalf of plaintiff as follows:

I am the daughter of Israel Ferguson, deceased. I lived with my father up to the time of his death. I remember the death of his son, John Ferguson, and his business troubles. Before these business troubles, and the death of his son John, he was always pleasant and lively with his family, and seemed to enjoy himself with them always. He was a great deal with us in the house; never went out very much; spent his evenings
119 at home always with the family. After his business troubles and the death of his son John, I noticed a decided change in his conduct. He seemed to want to be by himself all the time.

(And thereupon the defendant, by its counsel, objected to the witness stating how he seemed, and moved to strike out that portion of her testimony. The court refused to grant the motion; to which ruling and decision of the court in refusing to grant the motion to strike out that part of the witness'es testimony in which she states how the deceased seemed the defendant then and there in, open court during the trial, duly excepted, and prayed that its exception might be allowed by the court, and made a part of the record of the case, which was done and ordered accordingly.)

The witness then continued as follows: He went by himself and he stayed by himself in a room in the dark. I don't remember that I ever opened the door of the room and looked in and saw him, but my sisters have. Shortly before his death he was very pale and looked wor-
120 ried, and he complained a great deal of his head. He would complain often of his head, and say it was his head that troubled him. He would say that all his trouble was in his head, and when we often sug-

gested to him to go to a doctor to see about it, he would say "The doctor can't cure me. It is no use." At the time of his death he lost his appetite and was pale and complained a great deal of his head, and the last morning I saw him I noticed a queer expression about his eyes. It was a sort of wild, unnatural expression. The last morning I saw him alive, he refused to take his breakfast. He took a cup of coffee that mother handed him, and two or three mouthfuls, and then passed back to the kitchen, and did not take any more at all. He seemed to be greatly excited, by his manner, and went out in a great hurry. This was, I should think, about between half past seven and eight in the morning. That was the last I saw of him before the funeral.

Being cross-examined she testified as follows:

121 When he went by himself and was in the dark, that was in his bed-room. My father, during the last six months of his life, usually went to his business between eight and nine o'clock in the morning, and would return between four and five in the afternoon. He did not come home at mid-day for lunch. We were accustomed to dine after he came home. He was accustomed to be at home at his meals. I think he changed in appearance before the death of my brother. There was a gradual change. He had been depressed before that. The circumstances of my brother's death were peculiarly harrowing. This demeanor I have spoken of, displayed itself pretty soon after my brother's death, and continued up to the time I last saw him alive. It was after my brother's death that we changed our residence from the lower part of the house to the upper. In my father's reduced circumstances, we reduced our mode of living. It was more economical, and, of course, much more uncomfortable than before.

Being re-examined by plaintiff's counsel, the witness further testified as follows:

122 My father very often referred to the death of his son. He would speak about the manner of it. He never said very much about it, but he would express by his manner that he thought it was terrible the way he died. Of course he missed him a great deal in the business, but he spoke more often of the manner of his death.

GERTRUDE FERGUSON, being next called and duly sworn, testified on behalf of the plaintiff as follows:

I am also the daughter of Israel Ferguson, deceased. I lived in the family with him and my sister. At or about the time of my father's death he was very much changed and was very excitable. He looked different and had a wild expression. He stayed a great deal by himself in his room when he came home from business. He would go to his room and lie on his bed with his hat and overcoat on, and not come out to his meals. This was about two or three months before his death, I think. I do not particularly remember anything about what took place on the day

123 before or a few days before his death. On the morning of his death he looked different and acted different. He was paler and was more excitable. I don't remember anything particularly that he said and did on the last morning before his death. He did not have a natural expression. He looked wild. I was there at the time he got up and went

out. He was at the table, and he was drinking his coffee, and he took it up and went to the kitchen, and set it on the table, and went out quickly.

Being cross-examined by defendant's counsel, she testified as follows:

This going into his room was two or three months before his death. I followed him into his room sometimes—three or four times, may be oftener. I did not speak to him then; I asked him to come out to his meals; that is all.

Being re-examined by plaintiff's counsel she further testified as follows:

When I went in to call him to his meals he was on the bed and on his face. He would say he didn't want anything, but if you brought it
124 to his room he would always eat it. He wore a soft felt hat.

SARAH FERGUSON, being next called and duly sworn, testified on behalf of the plaintiff as follows:

I lived at home with my father before his death. A short time before his death he seemed to be gloomy and didn't care for anything, and didn't care to be with us. He seemed to want to be by himself all the time in his room. I have gone there three or four times and called him, and he would be on the bed with his face down and his things on—his hat and coat on. I was there in the house the last day or so before his death. He looked very wild and strange out of his eyes. I remember the last day he was there. He didn't seem to want to stay in the house, but seemed to want to get out. I noticed something that looked like excitement at that time. He acted kind of wild and looked queer out of his eyes. That was the last time I saw him.

Being cross-examined by defendant's counsel, she testified as follows:

125 I cannot give you any better idea of what I mean by his acting wild. I have not known people that could do it acting or doing it for effect. It is not a look that I have been accustomed to see upon others. I cannot say anything more about it than that it was a little different from what I have seen at other times in him—a different look. I have not seen my father excited at times previous to this time. I have seen him simply when he was in health and good spirits, and when in bad health and bad spirits; at one time a jovial look, and at another a depressed look—not a look of ugliness or maliciousness; I never saw that. I never saw him in anger.

Being re-examined by plaintiff's counsel she further testified as follows:

I have heard my father speak of the trouble with his head. He said his head felt bad quite a good many times. I have seen him put his hand up to his head lik' this (illustrating it), with his head bent down, and he would say, "My head troubles me."

GERTRUDE FERGUSON, being recalled and duly sworn, testified
126 on behalf of plaintiff as follows:

I have heard my father complain of his head. He used to say it was all wrong; his head was not right. I have heard him say it very often. I have seen him put his hands up to his head.

Being cross-examined by defendant's counsel, she testified as follows:

I don't remember the first time I ever noticed this. My father had had headache. I have seen people complain of their head and have headache. I remember the last time he complained of his head—the night before. That was the time he said his head was all wrong. I have heard him say it before. He did not say it to us all. He was in the parlor. He said it to me only. I asked him how he felt, and he said his head was all wrong. Nobody contradicted him, and I made no reply.

JOHN M. KOSTER, being next called and duly sworn, testified as follows for the plaintiff:

I am engaged in business in the city of New York. I was ac-
127 quainted with Israel Ferguson in his life-time.

Q. Did you see him on Friday, the day of his death, or the day before?

A. I saw him on Friday morning. I don't know whether he died that day.

Q. Where did you see him?

A. At his office.

The COURT. Was this the day before his death?

PLAINTIFF'S COUNSEL. Friday was the last day he was seen alive.

Witness continues: I called at the office on this Friday morning. I saw Mr. Ferguson there. I went into the office and said "Good morning." Mr. Mills, who was there, said "Good morning." Mr. Ferguson said nothing. I borrowed, I believe, a marking-pot from Mr. Mills and went away. Mr. Ferguson stood in the back part of the office, facing me. I spoke loud enough for him to hear. He stood at his writing-desk this way (indicating), and his head rested on it that way (indicating), and where Mr. Brown stands now, is about the entrance. The office is twelve to fifteen feet long and seven feet wide, and he stood there and answered
me nothing, and I went away. We were neighbours. When I
128 had saluted him previous to this time, he had always responded.

WILLIAM M. MILLS, being recalled and duly sworn, testified for the plaintiff as follows:

I was a partner of Mr. Ferguson in his life-time. I was with him at his place of business. I had known him since the summer of 1873. Mr. Ferguson was always a very genial gentleman when I first knew him. After the death of his son in 1874, when I came up to see him, I noticed a marked difference in his manner and action in every way. I was attracted to noticing him by our business together. I would inquire oftentimes, when I would find him in these positions, "What is the matter, Mr. Ferguson; what can I do for you?" and he said he was all right except his head pained him; and that was repeated continually—that he was all right physically, but his head was out of order, though he would get over it, he thought. That was continuous down to the very last day of his life.

I cannot tell you how many months back he complained of his head.
129 It must have been four or five or six—along in 1875 and during the summer of 1875. Mr. Ferguson was a very fine-looking man, and he had a large black eye that was mild and benevolent looking, but it became wild and glassy at times, and he would stare at me when I would be

in conversation with him. I know the fact of the death of his son John. I cannot define the effect this had on him. I know I feared to mention his name because every time it was mentioned he would act so queer. I had every reason to believe that he did not attend to his business as he did formerly. In the morning of the day of his death on leaving the house he would not sit down to breakfast. I was there at the house. I lived there. I wanted him to sit down to breakfast with me, so that we could go to the office together, and he picked up a cup of coffee and a piece of bread and went into the little kitchen, and stood up and took a little bite of bread and drank part of the coffee and set the rest down, saying, "Well, I have had my breakfast." He went ahead and I followed him down-stairs.

We went to the office. In the back part of the office, facing
130 the front door, was a high desk, where a man could stand this way (indicating it) and he was leaning on his hand this way (indicating it) and a friend, Mr. Koster, came in and I noticed he did not salute him, although he was right opposite to him, but stared in that way. Then a moment afterwards he picked up his hat, went out of the door, and when he got into the lane where the truck comes he beckoned to me. I went out to him, and we proceeded down 39th street. He walked at such a rapid rate, with his head down, that I had to check him, and tell him I would have to run if he went so fast, and we got down to 34th street, and there I stopped and he stopped. Then he was going down to 7th avenue, and take the cars down town. We did not part there. I went with him down as far as 34th street from 39th street, and he then, after a few minutes' talk on the corner, went up 34th street. Our place of business was at 607 39th street. The subject arose like this: I was worried about our business transactions which we had with Badry & Co. in the shape of
131 five or six thousand bushels of hair, in which we deal, and I reminded him of that, and wanted him to go and attend to it, as he attended to the down-town business, as I was a stranger in the business and didn't know much about it. When I broached the business he said, "Yes, yes, yes, I will attend to that the first thing," and then he started across the sidewalk, and I says, "Hold on, I think I may have to go down home." My wife was sick at the time, and he stepped back on the sidewalk again, and he was very pale, and the glassy look was in his eye, and then a difference I never saw before so particularly, and his hand was feverish and hot. He says, "William, don't go down to-day. I will come home early to-night, and to-morrow is the last day, Saturday, and I would like to talk to you." Says I, "All right, I won't go down to-day. I will wait until to-morrow." Then he turned around and shook hands with me again and started across the street, and I stood and watched him as he went up the street, puzzled at the idea, and I noticed him swinging himself
132 in a peculiar way that I never saw before; in that way (illustrating). He usually would have his hands tight down in his pocket, and his head down, and he would take out his hand and flirt himself in that way; and when I went back to the office again I told his son—our book-keeper—what had occurred. That was the last I saw of him alive.

Being cross-examined by defendant's counsel, he testified as follows:

Mr. Ferguson was supposed to attend to the down-town business and go on 'change, where his son John had been in the habit of going, to buy and sell. I didn't attend to any particular branch of the business from the fact

that I was a perfect stranger in the business. I did something. I sat in the office, and days that he would not go down town I would go down. He was the principal business man. I went in business with him either in September or October, after the death of his son John in 1874. I was, with him in business
a year and seven or eight months. His son Israel was there as book-
133 keeper, and Mr. Hafner, who had always been with him, was there still. When I came there he was there doing a little of everything—driving, putting up the stock, and delivering, &c. I put money—capital—into the business. The business was already established when I came in. Mr. Ferguson had already lost a good deal of money, according to accounts; I don't know how much money. He had money then, and my money was used in business. I suppose he had as much in there as I had. Mr. Ferguson did not become indebted to the firm during his life-time, that I know of. I never closed up the accounts except by an assignment which is, I believe, not settled to-day. The firm made an assignment after his death. I mean to say that I cannot tell whether I owed the firm or he owed it as between ourselves. I mean to tell the jury that fact. I guess we lost everything. I don't think Mr. Ferguson owed anything to the firm. We had no arrangement as to how much each should draw out.
He drew out as he wanted from time to time. Our firm did not
134 make money while we were together. We both sunk money, and we both drew for our living from the firm. I could not say who was the greatest debtor. Mr. Ferguson for months did not pay any attention to his books at all. His son was the only man and myself that knew in what shape the business stood. I don't know whether I put more money into the business than he did or not. I supposed we were equal partners. His goods were appraised when I came in, and I put in so much money against them. I cannot tell whether his drawings out exceeded mine. I went in there in October. His son died in August. I got acquainted with Mr. Ferguson down on the Shrewsbury River in the summer of 1873. I was not on particularly intimate terms with him before I went into business with him. When I first became acquainted with him the firm was Ferguson & Hyde, and their works covered then fourteen lots of land. I noticed that he did not act as he did on the river; not so free, but still he was pleasant. That was previous to the son's death. He
was on his vacation when I first became acquainted with him on
135 the Shrewsbury River in 1873. That was before his son's death. I remember that I noticed the change after the son's death. I noticed that Mr. Ferguson was not as jovial and jolly a man after he failed with Mr. Hyde as before, but still there was that vim for business, and hence I went in business with him, but I did not make the arrangements for that purpose until after this accident happened. All at once I was telegraphed to come to the funeral of the son—this accident happened. That put a stop to our business relations for some little time after the funeral took place. Then when I came up to the city and talked business I found a different man, but I had the cause; I supposed he would get over it like other men. I had had my losses in family too. I expected and hoped our business would be prosperous. Mr. Ferguson's eye would appear as though he feared people, and wanted to get out of the way—that's what I mean by his eye becoming wild. I have seen men in anger and have noticed their eyes. That is not what I mean by a wild eye. Nor do

I mean that kind of expression which the human takes on when
136 one is frightened. I mean a far-off, glassy look, as though the mind was dwelling on nothing.

(Defendant's counsel objects to the last clause of the witness'es answer and moved to strike it out. The court refused to grant the motion; to which ruling and decision of the court in refusing to grant the motion to strike out the last clause of the witness'es answer the defendant then and there, in open court during the trial, duly excepted and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.)

The witness then continued as follows: He did not appear to be studying anything. Then again it would assume a troubled, feverish look. I describe his look at times when he was quiet as a far-off look, and when he was in emotion this wild and glassy look, and particularly if I broached anything about business—when I brought his mind back to business—and he would have this troubled, wild, glassy look as if he was troubled to understand you. The wild, glassy look was when business was in
137 his mind, and the other look was when he was not busy. I had conversations with him every day about business, and about other matters when business was not pressing. Not about his family troubles—very seldom touched on those subjects—the newspapers, news of the day, or something of that kind. I was living in the same house with Mr. Ferguson when I was in business with him. I was boarding with his family. My family was in New Jersey. I spent the week here and spent Sunday with my family. That was my habit. At that time Mr. Ferguson's family occupied the second floor of the house, I think. Really I forget how many pairs of stairs you went up. I think it was a four-story house. I think they occupied the one above the parlor floor, and my room was on that floor. It was a large flat, three rooms deep, and then bed-rooms and kitchen. It was the same house in which he had formerly lived on the floor below. They moved upstairs for economy's sake. I had so boarded with Mr. Ferguson's family ever since my coming to the city, all the time I was in business with him. His family consisted of the three daughters, his son, and son's wife and his other son—five
138 children and the wife of one of the sons. I really don't know whether Mr. Ferguson was indebted to me at the time of his death.

ALFRED W. WALKER, being next called and duly sworn, testified on behalf of the plaintiff as follows:

I reside in the city of New York, and have resided here for many years. I knew Mr. Israel Ferguson in his life-time. I saw him a short period before his death. I was sitting in my office one day and on looking out of the window saw him pass by and immediately noticed that he looked very sadly.

(And thereupon the defendant's counsel objected to the witness'es stating that he looked sadly, and moved to strike out that statement. The court refused to grant the motion; to which ruling and decision of the court in refusing to grant the motion to strike out the witness'es statement that he looked sadly, the defendant then and there, in open court during the trial, duly excepted, and prayed that the exception might be allowed by the court and made part of the record of the case, which was done and ordered accordingly.

139 The witness then continued as follows: He passed my house and I saw him, and, as I said, he looked very sadly. I cannot describe it in any other way—so much so that it struck me with amazement. He looked sad, sufficient to attract my attention, and he walked the street in a peculiar manner. He was bent over and walked in that manner, and that struck me more than his appearance. I had known him some time. His manner differed altogether from his manner on a former occasion. He was always a cheerful man as I understood. It was a very few days before his death if I remember rightly, that I last saw him. I had no conversation with him at that time.

RALPH L. PARSONS, being next called and duly sworn, testified on behalf of the plaintiff as follows:

I am a practising physician. I have made the mind and mental diseases a special study. I was at the New York City Lunatic Asylum as assistant physician three and a half years from 1867; was placed in charge of it January, 1875; remained in charge for about twelve years,
140 and was one year in charge of the Kings County Lunatic Asylum afterwards. I have been in charge there as assistant or principal seventeen or eighteen years. I have been present here in court during the examination of all the witnesses. I was here for the purpose of hearing and paying attention to the testimony, and have paid careful and strict attention to it.

Q. (By the COURT, after reducing the question to writing.) Assuming that the deceased, prior to the year 1874, was a man about fifty years of age, in good health, of cheerful temperament, social disposition, active habits, intelligent, and of fully average mental vigor; having been in easy pecuniary circumstances, after that experienced business losses, which reduced him to straightened circumstances, and following closely upon the loss of his son, who was a great assistance to him in his business, and whose death was sudden and under circumstances peculiarly distressing; who after his business losses became somewhat depressed, but after the death of his son more so, and in a marked degree; who from that time began to lose interest in his business, became dejected, began to avoid the
141 society of his friends and family, complained of difficulty in his head, at times refused to eat unless pressed to do so; occasionally, as time progressed, exhibited excitement and abstraction of manner, and within a day or two before his death did not return the salutation of an acquaintance, and who at that time left his family without apparent cause, and within a day or two was found dead under circumstances which indicated that he had committed suicide—what opinion would you form of the mental condition of the person thus described at the time of leaving his family?

DEFENDANT'S COUNSEL. I shall have to treat this as my friend's question, and object to it for the reason that it does not sufficiently state the facts in evidence to get at the witness's judgment in these respects; that your honor's statement that he began to lose interest in his business, I don't remember as having been testified to.

The COURT. It was the testimony of the merchant from Boston.

PLAINTIFF'S COUNSEL. And of Hafner also.

DEFENDANT'S COUNSEL. I don't think they said that he lost interest in his business, but his business seemed to be falling away. Your honor also stated that he avoided intercourse with his friends and family.

142 The COURT. I will say "Avoided the society of his family." That is predicated upon the testimony of his daughter.

DEFENDANT'S COUNSEL. "That he left his family without any apparent cause," would look like abandonment. He left in the morning, as he had been accustomed to, with his partner, to go to his place of business.

The COURT. Your qualification is correct.

DEFENDANT'S COUNSEL. And I submit that the witness before expressing an opinion, should have made to him such statement of the facts attending the suicidal act which go to show, for instance, the great deliberation of it—the procuring of the stone. Your honor puts it "under circumstances indicating suicide." I suppose all the facts regarding that should be shown.

The COURT. I think I will leave out altogether from this question the fact of suicide.

Q. (By the COURT to the witness.) Excluding the fact of suicide from the question I gave you, and modifying it so as to assume that he left home apparently to go to his place of business and did not return—as I think you must have in the fact that he was found dead, and say

143 nothing about suicide.

DEFENDANT'S COUNSEL. I except to the form of the question as not containing sufficient details to make it material.

Q. (By the COURT to the witness.) I say that after the business losses he became somewhat depressed, and that after the death of his son he became more so from that time onward—began to lose interest in his business, became dejected, began to avoid the society of his family, complained of difficulty in his head at times; these symptoms continuing until the time of his death.

DEFENDANT'S COUNSEL. Your honor states that following close upon the business losses came the death of his son. The business losses were in 1873, and his son's death was in 1874, so that it would be an interval of eight months.

The COURT. His losses, I assume, were gradual, but had become well understood at the time of his son's death.

DEFENDANT'S COUNSEL. Shortly after the panic of 1873 I think he became all broken up financially. He was swamped, financially, by that panic; and his son did not die until the 22nd of August following.

144 The COURT. I will say soon after the loss of his property came the loss of his son.

Mr. HOYT, of defendant's counsel. I would object to the question as incompetent, as trying an issue that has already been tried. It is presented in a little different form from what it was as a bar to the suit. The case when tried in the common pleas went thus: The plaintiff proved his policy. The defendant proved the manner of the death, and rested; and then the plaintiff undertook to make out the case of insanity. He failed on that, and judgment was given for defendant in some form or other which is material, as I take it, here. The only question decided in that case was the question of insanity, and the court could not have arrived at the conclusion it did without determining that point.

(Defendant's counsel thereupon objected to the question as immaterial and incompetent. The court overruled the objection; to which ruling and decision of the court in overruling the objection to the question, the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court, and made
145 a part of the record of the case, which was done and ordered accordingly.)

The witness then answered the question as follows: I think I have the question pretty clearly in mind, and my opinion would be that the man was insane.

And in answer to further questions by plaintiff's counsel the witness continued as follows:

The particular condition of mind was one of mental depression, which is usually termed melancholia or melancholy. In that condition of insanity the controlling power of the will is in variable degrees diminished—diminished more or less at different times, but always diminished in some particulars, so that at some time the patient can act with considerable judgment so as not to attract the notice of ordinary observers, and at other times be unable entirely of his own free will to control his actions in a rational manner. I am making a general statement of that form of insanity. I should have said perhaps that there are two recognized forms of melancholia, one with delusions and the other without.

146 Being cross-examined by defendant's counsel, he testified as follows:

This subject of melancholia has not excited among scientific men, text-writers, physicians, and specialists in diseases of the mind, more discussions than other forms. Dementia is one of the results of melancholia. Melancholia is acute in its early stages. It differs certainly. There is a very wide range between the earliest or the slightest melancholia as developed in the human mind and the greatest. There is no fixed line between what is called despondency, mental depression, and melancholia. There is a difference, and it is a matter of judgment and experience where the line should be. There are marked physical indications always when a person has stepped over the line between despondency and melancholia. I will say this: There is no such well-marked physical characteristics that two men would be certain to place the point of departure from health exactly at the same moment of time. But there are physical characteristics sufficiently distinct so that an expert can see that they exist. One might discover it earlier than another. The very line of separation between
147 despondency and melancholia is variable and would be variable in the views of men of different experience, different observers, so that there is an element of uncertainty about that. There must be. There is an element of uncertainty about this whole business in the early beginnings. There is one point of importance among the matters stated to me by the judge in the question. The hypothetical question includes the hypothesis of mental depression. The hypothesis that this mental depression is continuous and continually increasing for a long continued period of time. That is of immense importance in the consideration of this case.

Q. You understood that the increased depression is occasioned by an increase of cause. It is not an increase of the original depression founded upon the original cause, the loss of property, but superadded to that is the

loss of a son. After that the depression increased. Now would you strictly speak of that as an original depression gradually increasing when it has been so added to or increased by the original cause of depression?

A. I could answer that better perhaps in this way: It adds to the
148 difficulty of the case. There is always difficulty in distinguishing simple melancholy at the very beginnings from ordinary depression, which is not melancholia. Now, that difficulty continues if you add from time to time new causes for despondency, but with sufficient length of time in the normally sane mind they get accustomed even to accessions of new causes of despondency. A man becomes hardened, as it were, to the influence of such circumstances. So if the despondency, even with the accession of new causes, continually increases, it may come to such a degree as to make the existence of melancholia and disease evident to an expert.

Q Is not mental depression or melancholy a natural result from such a cause. Is it not natural that a man who has been accustomed to comforts that attended the possession of $40,000 or $50,000, who is stripped of his money at that time of life, stripped of the comforts which that money had secured to him; is it not natural that that man or any man should be depressed and to a certain extent despondent?

149 A. It is natural; but on the other hand they recuperate more quickly than men of other temperaments.

Q. Is it possible for any expert to testify clearly and with any degree of certainty on that subject unless he knew the bodily and mental temperament of the patient more than you can possibly know from the hypothetical question?

A. I should not say that. If the hypothetical question is worth anything at all, it ought to guide the expert somewhat. A knowledge of the temperament is important, and the statement that he was a jovial, cheerful, pleasant man is not a satisfactory statement. What I say is, that I should trust my own judgment better than any other person who stated what his temperament was. I think that from this hypothetical question I can bring into my own mind a fair idea of the bodily and mental temperament of Mr. Ferguson. I don't mean such an one as I should like, but a fair idea. He might have been exceptionally strong in mind and body, and this might not have been stated to me in this hypothetical question. The continuity and increase in this depression in a certain way and up to a certain
150 point is the circumstance which I say would not exist in a sane man. There may have been intervals. I mean a general continuity. That is to say, it ran as a general thing over a considerable period of time. As to the ability of insane persons to continue in business, and what influence the fact of their continuing in business would have upon my judgment regarding the existence of insanity, I would say regarding that, that many insane patients continue in the routine of business creditably and some of them extraordinarily well, so that the fact of his continuing in the pursuit of routine business, and in the routine way, would not influence my judgment in regard to the opinion I otherwise expressed. Now, if he had done this business in such a way as to attract no attention, as not to produce any evidence in the minds of other men that he did not do it just as he did formerly, or that there was no change in the man—that would alter my opinion with regard to the man. Assuming that in this case there is no evidence that so far as the business he could get to do is concerned, he did

not do it precisely as he had done it before (there being of course
151 a falling off in the volume of it), that fact that he did the business at all, would not damage my opinion or modify it, but if he did it in such a way as not to attract the attention of observers, it would influence my opinion. I refer to the change in his general characteristics and appearance. I believe that although insane he could go on and do business. If he did business in a certain peculiar way, that peculiar way might contain evidence of insanity. If there were no such peculiarities I should have no evidence of insanity so far as that went. If there was no evidence that he did it in a peculiar way, I should assume that he was not insane. I don't know that any scientists have said that nobody is sane. Some people say so. I have not heard that they are writers on insanity. It may be that they are. I do not now think of any particular circumstance in this question put to me other than that which I have mentioned, which could not have attended the case of a sane man. I cannot clearly separate what I have heard from the witnesses and the question. I have some in mind. I can say in a general way that I do not remember a par-
152 ticular thing mentioned that a sane man might not do on one or more occasions without involving the question of his being insane. A sane man might do those things sometimes. Sane men do those things. They are abstracted sometimes—talk to themselves. It is very common for sane men to pass a man in the street and not answer him at all, and things of that kind, and go along gesticulating sometimes—at least it is not uncommon. I could not separate any of the elements of the question given to me by the judge and say "Those do not indicate insanity," and say of the others "Those do." I do not try; I take the full case. I take the history as given in the hypothetical question and group the facts. It is a very difficult question to answer at what time in this career in my judgment Mr. Ferguson's despondency became melancholia, but still my impression is that for a considerable period of time before his death he was in that state—for months before. I could not pretend to say where the line was. I have not considered the manner of his death in coming to this conclusion. It has not entered into my opinion at all. So that if the man were living
153 now, and the question arose as to his insanity on that Friday my answer would be the same. What I mean by insane is, the mental condition of the person in question had changed in a very marked degree from his normal mental condition, and that degree was such as to involve the free exercise of the will power, to involve it in a serious degree. It is very difficult to state mathematically to what extent I have heard things in that question which indicate to me that Mr. Ferguson on some occasion did not exercise his will. All through his——

Q. (Interrupting.) Tell us which circumstance shows that he did not act voluntarily?

A. The government of himself and his feelings.

Q. This outward manifestation of despondency?

A. The whole of it. It extended through his whole life and governed the man.

Q. Do you understand the whole life of the man?

A. During those two years I judge from.

Q. Taking the case of any man who has been active, and mingled
154 with his fellow-men to a considerable extent, and socially mingled

with people, can any reasonable amount of evidence of two or three, or, say, six people, giving only isolated instances when they saw him in the street, when he had the attitude of a despondent man, give you more than a general idea of the mental condition of the party? Do you understand my question?

A. Yes, sir, I understand your question. That depends upon the number of facts adduced.

Q. I will put it in this way: Don't you, then, in forming this opinion, assume that what A testified was the situation to-day continued to be his situation, that those manifestations stated by people are continuous, in order to get at the general continuous mental state?

A. There is an assumption of this kind, certainly. I have met with a great many cases of melancholia in all its stages. Half of them get well, a great many of them. I have seen people of whom we say "That man has a melancholy temperament," without implying the idea of insanity. There are many such men. There is a difference of temperament. Some
155 men in their normal state are as much depressed as others when they are insane. Some men are of a naturally melancholy temperament and appear as melancholy as other men who are depressed. They will exhibit some of the symptoms of people who are suffering from insanity. I assume that in the case of the hypothetical question put to me there was no delusion. I think there is no difference of opinion between gentlemen of my profession who have made this subject a special study with regard to the existence of melancholia sine delirio; that is, without delusion. That is what I think this case was from the hypothetical question—without delusion. My experience has been more in connection with large institutions for the insane than in the common walks of life. There I have seen persons live and move about for lengthened periods of time, either wholly or partially pursuing their usual walks of life, who were afflicted, as I stated in answer to this question, that this person was afflicted. I have had some under my care outside of asylums who have been in a similar condition for several months together, and then recovered. If it had
156 continued, and they had not recovered, they would have been sent to an asylum. The bodily condition is usually depressed. My experience with persons suffering with this form of insanity called melancholia has been mostly in asylums—not altogether. There were cases not more aggravated than the present. When we use the word "asylum" it is not simply a word meaning a place of confinement, but a place for the cure of people. The New York City Asylum was at Blackwell's Island. That is the charitable asylum that the city supports. It is for the main part charitable. Some patients pay. I have never had charge of an asylum other than belonging to a public institution, with the exception of some private patients. I keep private patients now at my own house in the city. This theory that insanity may exist without delusion is not modern. It is modern as far as certain forms of insanity are concerned. That is what is usually called moral insanity.

Q. I mean apart from delirium is it not so?

A. Yes, but not as far as regards melancholy. I think there has been no question of difference between writers and observers in regard
157 to this insanity. There are in regard to kleptomania and some of those cases of moral insanity.

Being re-examined by plaintiff's counsel, he testified as follows:

Q. Please tell me what is the authority of Henry Maudsley, M. D., the writer of Scientific Treatment of the Mind, who is known as a fellow of the College of Physicians and Medical Jurisprudence in London, and who is the writer of many works on the subject of insanity?

(And thereupon the defendant, by its counsel, objected to the question as immaterial. The court overruled the objection; to which ruling and decision of the court in overruling the objection and allowing the question to be answered by the witness the defendant then and there in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made part of the record of the case, which was done and ordered accordingly.)

A. He is considered an authority of the first rank. Thomas Dickerson was considered a very promising young man, and wrote a very
158 fair work. Forbes Winslow, M. D., is an authority also. Those are all recognized authorities in the profession, except Dickerson. He was a young man, and wrote one work. He is dead now. Dr. Blandford is an authority also, and Dr. Ray is an authority of the first rank.

Being recross-examined by defendant's counsel, he testified as follows:

Wharton and Stillé are authorities as writers of medical jurisprudence, but as experts in the matter of insanity I should judge not. They are collaters, and reliable as such. It is one of the standard legal insanity books now. It cannot be said to be newer than Ray, because Ray has a recent edition. The standing on such subjects of Dr. Gray, of the State Asylum at Utica, is good.

And thereupon the plaintiff rested his case.

And thereupon the defendant, by its counsel, requested the court to instruct the jury to render a verdict for the defendant on the ground
159 that on the facts of the case it is proved and undisputed that said Israel Ferguson died by suicide, and there is no evidence in the case that at the time he took his life he was so far insane that he did not know the physical consequences of his act, or had lost all control of his will.

The court refused to so instruct the jury; to which ruling and decision of the court in refusing to give the instructions as requested the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

GEORGE C. S. CHOATE, being then called and duly sworn, testified on behalf of the defendant as follows:

I am a physician, and have been for thirty years. I have attended exclusively to diseases of the mind and the treatment of the insane for the last twenty-seven years. For seventeen years I had charge of a State lunatic asylum in Massachusetts. For the last ten years I have been engaged in treating insanity privately in New York. I have a private asylum here. I have been during that time actively employed. I
160 am familiar with the form of insanity known as melancholia, both theoretically and practically.

The court here reads to the witness the hypothetical question, as follows:

Q. Assuming that the deceased, prior to 1874, being a man about fifty years of age, in good health, of cheerful temperament, social disposition, active habits, intelligent, and of fully average mental vigor, having been in pecuniarily easy circumstances, about that time experienced business losses which reduced him to straightened circumstances, and soon after this lost his son, who was of great assistance to him in his business, whose death was sudden, under circumstances peculiarly distressing; that after his business losses he became somewhat depressed, but after the death of his son more so, and in a marked degree; that from that time he began to lose interest in his business, became dejected, began to avoid the society of his family, complained of difficulty in his head, at times refused to meet them unless pressed to do so; occasionally, as times progressed, exhibited excitement of manner and abstraction of mind, and then, a day or
161 two before his death, did not return the salutation of an acquaintance; who left home as usual, and shortly after was found dead, in the spring of 1876—assuming this statement of facts in regard to his condition, what opinion would you form as to his mental condition? Can you form and express an opinion on that condition?

A. There is one great fact in this question which has a bearing on the mental condition of the party. There are some other incidental acts of his that are noticed there, but the rest of the question comprises one great fact, that is, the change of character in the man. Now, change of character may be, and often is, one of the tests, and one of the best tests, of insanity, and in forming a judgment upon that change of character the inquiry must be whether that change of character is brought about by adequate external causes, or by some internal malady. If there is no adequate external cause, change of character alone is often sufficient to prove a case of insanity. If there is an adequate external cause, the inquiry is to be made whether the change of character corresponds to the change of circum-
162 stances; whether it is such a change of character as would be natural under the circumstances. If a man who has always been social, bright, intelligent, and lively, becomes depressed, inattentive to his business, unsocial, and no apparant cause is shown for that, that would of itself indicate mental disease. But if such a change occurs after disaster and misfortune, and under a great change of circumstances, it would not indicate insanity unless it was undue. There is a sane melancholy and insane melancholy. A sane melancholy is simply the depression of spirits that follows natural causes. That comes on from misfortune and from change of circumstances for the worst. Insane melancholy or the disease called melancholia comes on from internal causes. It is not in my experience very often produced by misfortune. It comes from other causes. Misfortunes, according to my experience, are more apt to produce some other form of insanity. This is more likely to come from physical causes; from excesses. The other circumstances alluded to in your question, that of complaint of unpleasant feelings, and pain in the head, is one. I don't look upon that as important in its significance upon the question of the
163 mental condition of the party. According to my experience, insane people do not complain much of pain or unpleasant feelings in the head. I doubt if so large a proportion of insane people make these

complaints as of sane people. The brain does not perceive pain of itself. Inattention to acquaintances seems to me to be not a matter of importance, and, as I said in the first place, the main thing is the change of character. Now, to my mind there is not a sufficient amount of facts in the question, as you have put it, to enable anybody to form a positive opinion whether this man was merely naturally depressed under his changed conditions, and the misfortune which had occurred to him, or whether that had passed on into a mental disease. At any rate, there is not to my mind sufficient there to prove insanity.

Q. (By defendant's counsel.) The matters stated in the question do not make you consider the man insane?

A. They do not.

Q. Assuming that Mr. Ferguson had continued to transact business up to the last moment when he was seen alive, which was Mr. Mills's
164 statement; assuming that he when found dead was found sustained by a rope made of three strands of a pocket-handkerchief knotted together, with his elbows resting partly on adjoining limbs of a tree, the place being a secluded place in Central Park; that near his feet there was a large stone which had to be brought a distance of at least two blocks to get there; that upon his person were found a razor and a revolver; and that he was found dead hanging by the neck thus sustained; also the fact that no bodily disease appears to have afflicted him, no accident—bodily accident—ever to have occurred to him; that none of his family or friends ever spoke of, communicated or complained, of any impairment of will, of mind, or of body, and that he moved about in the community where he had been accustomed to move in the manner he had previously, except that in isolated cases he would be seen with head bowed down, and a dejected appearance different from a cheerful one, and upon one occasion seemed to a party walking behind him to be talking to himself, and moving his lips; that his business troubles continued, and
165 that at the time of the death of his son he was still losing money and running behind—assuming those facts in addition to the question, please state to the jury from your knowledge and experience in this matter, does that indicate to your mind the possession of a sound or an unsound mind?

A. You spoke first of the manner of his death and of the way in which it was brought about. Now, the circumstances connected with his death indicated deliberation, preparation, and knowledge of the consequences of his act, and that it was not done under a sudden impulse; but they do not indicate whether he was sane or insane, because insane people I have known to commit an act of that sort with deliberation, cunning, and judgment. The fact that he continued in business up to the period when he was last seen alive, and that no thought occurred to any one that he was insane, I consider a fact of considerable importance. The fact that so few and infrequent cases of extraordinary conduct appeared to those people who were constantly with him, I consider a fact of great importance in estimating his mental condition. The facts which you alluded to as having
166 occurred, one or two of them are facts which should excite an inquiry into the man's condition. His meeting in the street with one person would lead me, and I suppose would lead any one, to inquire what is the state of that man's mind that he should act in that unusual

manner. But being an isolated case I don't think it can be considered of itself, or taken in connection with two or three others, to indicate mental unsoundness. I think a man might do those things a few times without predicating upon them unsoundness of mind. The fact that no more instances occurred to the people by whom he was constantly observed, I consider a much more important fact, and on the whole, taking these circumstances in addition to what was stated to me in the first question, I should look upon the man as sane.

Q. "Insanity" or "insane" is not an absolute term at all; that is to say, it does not express absolutely the extent or intensity. That is, a man may be a little insane, there is a question of degree?

A. Yes.

Q. And a man may be technically said to be insane and yet may he have reason or will to control him and govern him?

167 A. I think a great part of the insane people reason and come to their acts with motives just as sane people do.

Q. The question of the will—that is, whether some people distinguish will from reason?

A. Some people do; but I think the will cannot be separated from other parts of the mind. A man reasons on what he is about to do and brings a certain force to do it, which is all the will consists of. The insane undoubtedly reason, and almost all their acts are performed from a motive. The motive may be wrong, and they may reason wrong about it. They may start from things which they think are facts and which are not facts, and they go through the same process of reasoning as sane people.

Being cross-examined by plaintiff's counsel, he testified as follows:

Q. I will first read an extract from a work on "Pathology of Mind," by Henry Maudsley, M. D., a very recent work, and *and* then ask you a question in reference to it. He says, at page 357, speaking of melancholia, "In some instances it has come on very suddenly in consequence of a

168 severe mental shock, such as the abrupt announcement of the sudden death of one who was very near and dear. * * * More often, however, the natural grief which a sad bereavement occasions passes by slow degrees into a morbid depression." Is that your experience as one who has treated similar cases?

A. I think it is.

Q. I will read at page 357: "Before the profound change of feeling took place the patient has sometimes been distressed by a strange giddiness or numbness, or other indescribable sensation in the head, or has perhaps felt as though something had suddenly cracked there." Is that your experience?

A. My experience is that that is an uncommon thing, but that it may occur.

Q. Now, I will read at page 358: "At the beginning of melancholia in most cases, and throughout the disease in some cases, there is no definite delusion. The person is simply morbidly melancholy, suffering from melancholia simplex or melancholia sine delirio, as this condition of affective disorder has been called. But he is profoundly changed, notwith-

169 standing. His feelings regarding persons and events are strangely perverted, so that impressions which would naturally be agreeable

are painful and the attentions of his relatives occasion irritation or actual distress. He has no interest in his family or in his affairs; feels as if a cloud had settled upon him or a veil had been let down between him and them, since things seem not real as formerly, and it appears to him that he moves about in a sort of dream. He shuns society which is distressing to him; cares not to do any work; neglects his personal appearance; sinks into inactive brooding, and ends, perhaps if permitted, by lying in bed all day. All this while he is quite conscious of his unnatural state, and perhaps bursts into tears as he bewails it." Is that your experience?

A. I think that describes a certain class of cases that I see; they are not very numerous, but it does describe a certain class of cases.

Q. Again he says at page 366: "It is noteworthy in some cases of melancholia how sudden and complete may be the change from the deepest anguish and despair to a state of temporary calm and sanity. In-
170 deed it is not very uncommon to observe brief intervals of respite like momentary breaks of blue in an overcast sky, during which the person is himself again." Isn't that your experience?

A. No; I don't think my experience is that it is not an uncommon thing to have those periods. I have seen them, but I think they are very uncommon.

Q. I will read again at page 384: "Suicidal feelings and attempts are common in melancholia, so much so that one suspects their actual or possible existence, even when they have not been openly manifested." Is that your experience?

A. It is.

Q. He says again at pages 384 & 385: "The two delusions which are most often accompanied by suicidal tendencies are the delusions of eternal damnation and of impending worldly ruin. It has been truly said that the fear of poverty has caused more suicides than any insane delusion except the fear of hell." Is that your experience?

A. It is; yes.

Q. Again at page 392: "I ought not to omit to mention that
171 homicide, like suicide, is done in some instances during the paroxysm of melancholic panic with premeditation, without distinct motive, almost without consciousness at the time."

A. No, sir; it is not.

Q. Then at page 393: "The course which melancholia runs is to recovery in half or more than half the cases. In almost all the cases there are variations from time to time in the intensity of the symptoms, and these variations sometimes take place very suddenly. A person shall be calm and composed in the afternoon who was in a perfect frenzy of distress in the morning. Sometimes there are complete intermissions of the symptoms for a few hours or for a day, and then they return in all their intensity. For the most part these sudden conversions from deep gloom to apparent sanity are not to be relied on to be lasting."

A. I should differ only as regards frequency of cases where there are so sudden and violent changes. They are infrequent according to my experience.

Q. I will read you an extract because it bears on this question. These views are contained in an opinion delivered by Mr. Justice Woodward
172 in the supreme court of the State of Pennsylvania. It is the case of the

Connecticut Mutual Life Insurance Co. vs. Groome: "But the defendants relied on the fact that the steps by Mr. Borlean to destroy his life were consciously intelligent, and that he knew what the consequences of his taking the poison would be. There is no doubt that he had such knowledge. His very purpose was to kill himself. Such a degree of intelligence may well co-exist with faculties so distorted and a mind so shattered by long-continued suffering as to inspire a morbid impulse, the nature of which the weakened judgment cannot measure and the execution of which the uncertain and feeble will cannot restrain. Almost every insane man knows that food will satisfy hunger, and that water will quench thirst. He is able to realize that fire will burn him, that blood will follow the blow of a knife, and that he will feel pain if his flesh is torn, and acts consciously throughout his life on such knowledge. It survives often among the instincts of a man after the intellect is wrecked." He says in McElroy's case (Houston, J.): "All treatises on insanity and most reports of
173 trials relating to insane persons show that a total loss of reason and memory is unknown to courts and physicians unless in cases of delirium from diseases of absolute frenzy, and yet commissions of lunacy are constantly formed and wills and deeds set aside on the ground of insanity." I ask you whether in your experience the views here set forth are in harmony with your knowledge based on your experience?

(And thereupon the defendant, by its counsel, objected to the question as unfair and not competent on cross-examination. The court overruled the objection; to which ruling and decision of the court in overruling the objection and allowing the witness to answer the question the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.)

A. In the main I should agree entirely with the extract you have read. There are quite a number of propositions there, and some of them I should not state in exactly that way, but in the main they would correspond with my views.

174 Q. What do such facts as these indicate, referring to the hypothetical question which was put, of the condition of the deceased at the early period of his life, of the interest which he took in his family, of his cordiality towards his family, of that which took place which led him at home to keep aloof from his family and to lead him to retire to his room, and in connection with that the fact that the room which he occupied was dark, and that he would there prostrate himself, clothes and hat on, on the bed with head down? In your experience as a physician, doctor, if somebody should apply to you as a physician and say, "This is the condition of my friend. Now, we want your opinion as an experienced and practical gentleman, one who stands high in the community," what would be your impression from a statement made by a member of the family to you of such a fact as that?

(And thereupon the defendant, by its counsel, objected to the question as being only an isolated case, the facts in evidence not warranting the question. The court overruled the objection; to which ruling
175 and decision of the court in overruling the objection and allowing the question to be put the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be al-

lowed by the court and made a part of the record of the case, which was done and ordered accordingly.)

A. That would lead me to inquire into the man's mental condition, and it would lead me to inquire into the circumstances surrounding him, and it would lead me to inquire whether there had been such a change of circumstances as would correspond with the change in his character. If there had not been, I should tell the friends that I thought he was insane; but if there had been such change of circumstances as corresponded with the change of character, and there was no undue change in the person, I should say it was one of the natural consequences. In the first place he had health and prosperity; after the change he had adversity and poor health.

Q. Doctor, if you should meet a gentleman in the street whom
176 you know well, and was in the habit of taking him by the hand and shaking it, and with whom you were on such intimate terms as to call him "Israel," and when you should say "Good morning, Israel," he should reply only, "I've got 'em," and rush across the street, what would be the impression on your mind?

(And thereupon the defendant, by its counsel, objected to the question as not being what actually occurred. The court overruled the objection; to which ruling and decision of the court in overruling the objection and allowing the question to be put the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.)

Q. If he should say "All right; I've got 'em," and rush across the street, what would be your impression of him?

A. I should inquire "What's the matter with the man?"

Q. Would you inquire what was running after, or what was the condition of his mind, judging from that strange action?

177 A. I should inquire both.

Q. It would to you, as a gentleman of long experience and knowledge, indicate something quite erratic, would it not?

A. Yes; it would.

Being re-examined by defendant's counsel, he testified as follows:

I should say that none of those extracts which have been read to me exactly fitted the facts of this case as they have been given to me in the judge's question and that of the counsel for the defendant. They do in some features. Some of them have a practical bearing on the facts of this case and some not. I am acquainted with "The American Journal of Insanity." I am acquainted with Dr. Gray, of Utica, and with his article on "suicide" in this number of "The American Journal of Insanity."

Q. I will read Dr. Gray's statement: "There are many who believe that suicide is always an insane act. Suicide is always an unnatural act, but in a large proportion of cases, if not the majority, it is committed by sane people." Is that your view?

A. Yes, sir.

178 Q. He says also: "Suicides in the sane are committed either in a calm, deliberate state of mind, in which the individual, having determined on his course of action from full contemplation of all the consequences, resolves the question as he would any serious matter of business, or it is committed in a turbulent state of the emotions under conflicting

and harassing fears and apprehensions, or in a tempest of passion, or in an overwhelming disgust with the world, or under the influence of a long and wearing sorrow, or under the dread of suffering from loathsome or incurable disease, or, finally, as a matter of morbid sentiment." Is that your observation and experience?

A. Yes, sir.

Q. Those all being sane people?

A. Yes, sir.

Q. (Reading.) "Are there differences of an obvious character between suicide of sane and insane? The prominent and essential distinction between a suicide by a sane and an insane person may be easily stated. Delusion is the test and touch-stone in the diagnosis of insanity." Do you agree with this?

179 A. I should not say it is the only test.

Q. But it is one of the tests; it is a test?

A. It is one of the tests.

Q. (Reading.) "Suicide is often spoken of as an impulse. It is said a person is impulsively driven to suicide. Thus we have in books 'suicidal impulse,' 'suicidal mania,' 'suicidal insanity,' as though self-destruction was an instinctive feeling, an irresistible desire, bursting into action without cause. Can we conceive of an irresistible power generated in the mind without reason, without intellect or motive—a blind impulse to a physical act? My experience enables me to verify the declaration of Esquirol, that he had never seen an unequivocal instance of any individual drawn to the commission of suicide by an irresistible impulse, independently of any secret trouble, real or imaginary." Do you agree with that?

A. I should agree with that.

Q. The doctor says: "I have never seen a case of suicidal attempt where the person was insane, however mild the type, which was not pre-

180 ceded by more or less disturbance of physical health and mental oscillation."

A. I think if a man is insane there is some physical disturbance always. Therefore I should agree with that.

Q. (By plaintiff's counsel.) You would consider trouble of the brain a physical disturbance?

A. Yes, sir.

Q. (By defendant's counsel.) It does not follow, in your opinion, does it, that because a man has got disease of the brain he is insane?

A. No, sir.

Q. This is the summing up by the doctor: "That suicide is in no true sense an impulse, but in the sane and the insane it is the result of reflection and deliberation of more or less duration, and is an act determined on in the mind of the individual from causes accepted by his judgment as sufficient, whether real or imaginary, a mode of escape from threatened or supposed dishonor, shame, punishment, poverty, or suffering, real or imaginary." Does that sum up your views?

A. I believe it does. I believe I have stated that.

181 Q. Now this illustration from page 385 of Maudsley—there was a case there of the fear of poverty. Isn't that one of the things that a sane man has—the fear of poverty?

A. Yes, sir.

Being recross-examined by plaintiff's counsel, he testified as follows:

Q. I omitted an extract from Maudsley, page 362: "Superficial observers comfort themselves with the notion that the patient is not mad because he has no delusions, whereas he is more dangerously mad sometimes than if he had the most extravagant delusions, since his madness is likely to show itself in deeds rather than thoughts." Is that your experience?

A. No; I think I could not agree to that. I think there are insane people without delusions, but I think people with delusions are more likely to do dangerous acts. I am acquainted with the work of Ray on Insanity. It stands high among authorities.

Q. (Reading.) "That the insane mind is not entirely deprived of its power of moral discernment, but on many subjects is perfectly ra-
182 tional, and displays the exercise of a sound and well-balanced mind, is one of those facts now so well established that to question it would only display the height' of ignorance and presumption." Is that correct?

A. Perfectly.

The defendant here rested its case, and the testimony was closed on both sides.

The above and foregoing was all the evidence given on said trial by the respective parties.

And thereupon the defendant, by its counsel, again moved the court to dismiss the action on the ground of want of jurisdiction, both parties to the suit being citizens of the same State. The court denied the motion; to which ruling and decision of the court in *in* denying the motion to dismiss the action for want of jurisdiction the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

183 And thereupon the defendant, by its counsel, moved the court to direct the jury to render a verdict for the defendant on the ground that it appeared by the evidence and was established that the issues and questions in controversy in this action had been formerly tried and adjudicated in the court of common pleas for the city and county of New York, and that such trial and adjudication were final and conclusive against the plaintiff herein and a bar to this action. The court refused to instruct the jury; to which ruling and decision of the court in refusing to give the instruction so requested the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

And thereupon the defendant, by its counsel, moved the court to direct the jury to render a verdict for the defendant upon the ground that, it being proven that Israel Ferguson died by suicide, there was not evidence
184 sufficient to show that he was insane or to render defendant liable upon its contract. The court refused to so direct the jury; to which ruling and decision of the court in refusing to give the direction so requested the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

And thereupon the court, among other things, charged the jury as follows:

GENTLEMEN OF THE JURY: The plaintiff brings this action to recover upon a policy of insurance issued by the defendant, The Manhattan Life Insurance Company, upon the life of Israel Ferguson, bearing date June 15th, 1864, for the sum of ten thousand dollars. The defendant has interposed several defences to the plaintiff's cause of action, one of which is that this court has no jurisdiction, because the plaintiff in the action is not the real plaintiff and cannot maintain the action, having simply a
185 nominal and not a real interest. Another defence is that a former suit was brought by the person whom the present plaintiff represents, which was decided in favor of the defendant upon the same questions as those now involved. As to these two defences, gentlemen, it suffices for me to say that I rule against the defendant, and instruct you that they are not sustained by the proofs in the case. The defendant also claims that the plaintiff is not entitled to recover, because Israel Ferguson, whose life was insured, committed suicide, and that therefore his representative has no cause of action upon the policy, and it is upon the issue presented by this defence that the various questions of law and of fact which are to determine the case for present purposes arises.

The plaintiff proved the policy of insurance, proved that notice of the death of the person insured had been given in the manner required by the policy, and proved the death of the assured.

Thereupon the plaintiff rested, having established a prima facie case. Then the defendant introduced testimony which tended to show,
186 and which I think it is fair to say sufficiently established the fact, that Israel Ferguson committed suicide, that his death was caused by his own act, and thus the defendant established a satisfactory defence to the plaintiff's cause of action.

Then the plaintiff introduced testimony to show that Israel Ferguson at the time of his death was so far insane that his death was not caused by his own act within the meaning of the policy, and the question for you to determine is whether the evidence which has thus been introduced by the plaintiff is sufficient to satisfy you of the truth of the position taken by the plaintiff.

Now, the normal condition of every individual is that of sanity, insanity being an exceptional condition of the mind, and therefore it is that the burden is upon the plaintiff to satisfy you that at the time of Israel Ferguson's death his mind was so far diseased or unsound that the act of suicide was not his act within the meaning of the law and of the policy.

This is a question, gentlemen, which is to be approached calmly
187 and deliberately, and its decision is not to be influenced by prejudice or by sympathy.

The plain, simple question is presented for your consideration and determination: Was Israel Ferguson insane, or did he act under an insane impulse, at the time he committed suicide? If he was not, neither in law nor equitably is the plaintiff entitled to recover. The defendant had a right to insert as a provision of its contract the clause that it should not be liable in case the person insured came to his death by his own act; it is a provision almost universally inserted in insurance policies. It is one of the provisions which under this policy the defendant did not intend to insure against. It is a provision, therefore, under which the defendant is entitled to complete and ample protection.

I have said that the single and simple question for you to determine is, whether or not Israel Ferguson was insane, or acting under an insane impulse, at the time he took his own life. In one sense this not a simple question, because there are few questions of fact which are more difficult of a satisfactory solution in many cases—this, perhaps, may be termed
188 one of them—than whether a given individual at a given time was sane or insane. The theory of the plaintiff is that Israel Ferguson was suffering under that species of mental unsoundness which the experts describe as melancholia. It is by no means an easy question of fact to determine whether when an individual is depressed and gloomy and despondent he has passed beyond the line of demarcation between mental soundness and mental unsoundness, and yet that is the question which you are to decide in this case.

Before referring to the evidence, which I shall not refer to in great detail, it is well that you should understand the rules of law which control this case, and by which you are to ascertain whether Israel Ferguson was insane at the time he committed suicide within the meaning of the law. The counsel have read to you some extracts from the decisions of other courts; you are to take the law of this case from this court, and if any errors are committed in the instructions which I am now delivering to you, the party against whom those errors are committed will have
189 appropriate redress; but it would be very unsafe for you to permit yourselves to be influenced in your views of the law by any extracts which have been submitted to you from cases decided in other courts. There has been, and undoubtedly is now, some conflict in the authorities upon the question as to what degree of mental unsoundness constitutes insanity within the meaning of those conditions in a policy of insurance which provide that there shall be no recovery if the person insured died by his own hand or committed suicide, and some of the authorities have held the rule to be that if the person committing suicide had at the time sufficient mental capacity to appreciate the physical nature of the act then it was the act of a sane man.

Some of the authorities hold that the mind of the insured party must be effected to such a degree that at the time he could not distinguish between right and wrong; that not only could he not understand the physical character, but also that he could not understand the moral complexion of the act in which he engaged. Now, gentlemen, we have a controlling authority in the decision of the Supreme Court of the United States, from
190 which I shall read, which contains a full exposition of the law so far as it is necessary to be understood for the purposes of this case, and the rule thus laid down will be the rule which will determine you in the application of the evidence which has been elicited. In this case an instruction was requested on behalf of the insurance company to this effect: "If the jury believe from the evidence that the self-destruction of the deceased was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it, then and in that case, it is wholly immaterial that he was impelled thereto by insanity which impaired his sense of moral responsibility and rendered him to a certain extent irresponsible for his actions." That instruction the court below refused to give, and the refusal was sustained by the Supreme Court of the United

States. The court gave instructions which I shall now read and which were approved by the Supreme Court upon review. "It devolves on the plaintiff to prove such insanity on the part of the decedent existing
191 at the time of the suicide as will relieve the act of taking his own life from the effect, which by the general terms used in the policy, self-destruction, was to have, viz, to avoid the policy. It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable. To do this the act of self-destruction must have been the consequence of the insanity, and the mind of the decedent must have been so far deranged as to make him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do the company is liable. On the other hand, there is no presumption of law, prima facie or otherwise, that self-destruction arises from insanity, and if you believe from the evidence that the decedent, although excited or angry or distressed in
192 mind, formed the determination to take his own life, because in the exercise of his usual reasoning faculties he preferred death to life, then the company is not liable, because he died by his own act within the meaning of the policy.

Now, gentlemen, what is the evidence bearing upon the mental condition of the deceased at the time of his death? There are certain prominent undisputed facts in the case. As appears from the evidence, prior to 1873, the deceased, being about fifty years of age, was a man of sound mind, of sound physical health, active habits, a man of decision, and of a fair amount of business energy. He was of a cheerful disposition, was genial and social and even jovial. Owing to the panic of 1873 he sustained severe pecuniary losses. The evidence tends to show that these losses preyed somewhat upon his mind, but that in August, 1874, he sustained a severe loss in the death of his son, who was associated with him in business, and on whom, to a greater or less extent, he relied; that the death of the son occurred under circumstances peculiarly touching and distressing, and
193 that from that time until the day of his death the deceased was to a greater or less extent despondent, depressed, unhappy, melancholy. It is for you to say, gentlemen, whether this state of mind amounted to an unsoundness of mind. Evidence has been given of isolated instances which, it is claimed on the part of the plaintiff, indicate temporary aberration of mind, and as to these instances it will be your duty, first to recall the testimony and to see whether they really show my aberration of mind or not; whether they were not such incidental occurrences as can be explained consistently with the theory of sanity. And you may come to the conclusion that these are not of so much importance as the evidence which which tends to indicate a decided change in the manner, bearing, and character of the man. * * *

Now, I shall not attempt to take up the testimony of the different witnesses and analyse it. I shall simply try to impress upon you the consideration that if all the evidence in the case is as consistent with the theory of sanity as it is with the theory of insanity, then it will be your duty to find a verdict for the defendant.

Upon the part of the defendant, an argument based upon the
194 peculiar circumstances surrounding the suicide has been addressed to you, which is deserving of consideration; the various circumstances, showing premeditation, plan, thought, which, it is very fairly urged, afford quite strong evidence that at the time of his death he was in the full possession of his mental faculties. A serious question, gentlemen, which you will ask yourselves in this case, it seems to me, is this: Had he, in view of his misfortunes, and of the probable future that awaited him, deliberately come to the conclusion that it was better to die than to live, and did he in that view commit suicide, or was he so far mentally unsound that he could exercise a rational judgment upon the question of life and death? Did he become oblivious to the duties which he owed to his family, to his friends, and to himself? Was he impelled by a morbid impulse which he had not sufficient strength of will to resist, and acting under the influence of this insane impulse, did he determine to take his own life? Because, if his reasoning faculties were so far impaired
195 that he could not fairly estimate the moral consequences, the moral complexion of the act, even though he could reason sufficiently well to prepare with great deliberation, and to execute his design with success, nevertheless, within the authority which I have read, he was so far insane that the plaintiff is entitled to recover on this policy.

Now, gentlemen, I have endeavored not to indicate any opinion of my own in regard to the merits of this controversy. You are the exclusive judges of the question of fact. You will take this case, recall the evidence, carefully give the case that deliberation which its importance deserves, and I do not doubt you will be able to reach a correct conclusion.

And thereupon the defendant, by its counsel requested the court to charge and instruct the jury as follows:

2. That the act of suicide alone furnishes no evidence or presumption of insanity.

The court so charged the jury.

4. That if said Israel Ferguson died by suicide, the plaintiff
196 cannot recover unless he has proven to your satisfaction that such act of self-destruction was not Ferguson's voluntary and wilful act; that he had not at the time, sufficient power of mind and reason to understand the physical nature and consequences of such act, and did not have, at the time, a purpose and intention to cause his own death by the act.

The court refused to so charge the jury; to which ruling and decision of the court in refusing to charge the jury as so requested, the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed and made a part of the record of the case which was done, and ordered by the court accordingly.

5. That the burden of proof as to this question is upon the plaintiff, and if upon the evidence the question is left in doubt the plaintiff cannot recover.

The court refused to so charge the jury; to which ruling and decision of the court in refusing to charge the jury as so requested the defendant, then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part
197 of the record of the case, which was done and ordered accordingly.

6. That unless the evidence established that Israel Ferguson did not commit suicide consciously and voluntarily, the plaintiff cannot recover.

The court refused so to charge the jury; to which ruling and decision of the court in refusing to charge the jury as so requested the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made part of the record of the case, which was done and ordered accordingly.

7. That if he thus committed it, it is immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong.

The court refused so to charge the jury; to which ruling and decision of the court in refusing to charge the jury as so requested the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

198 8. That if Ferguson was insane he must have been insane to such an extent to render him unconscious of the nature and effect of the act of suicide to entitle the plaintiff to recover upon the policy. Proof that he is insane only is not sufficient.

The court refused to so charge the jury; to which ruling and decision of the court in refusing to charge the jury as so requested the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

9. That if the jury find from the evidence that Ferguson, impelled by any cause, whether domestic unhappiness or financial trouble, or both, voluntarily and with sufficient reason to know the consequences of the act, committed suicide, the plaintiff cannot recover.

The court refused so to charge the jury; to which ruling and decision of the court in refusing to charge the jury as so requested the defendant then and there, in open court during the trial, duly excepted, and

199 prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

10. That the only legal test of insanity is delusion.

The court refused so to charge the jury; to which ruling and decision of the court in refusing to charge the jury as so requested the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

11. That there is no evidence in this case of any delusion, and in the absence of such evidence the jury cannot infer the existence of any delusion.

The court refused to so charge the jury; to which ruling and decision of the court in refusing to charge the jury as so requested the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

12. That if circumstances existed that preyed upon Ferguson's

200 mind to such an extent as to lead him to prefer death to life, and in that state of mind he voluntarily and consciously destroyed

himself, it was a case of death by suicide within the meaning of the contract, and the defendant is not liable.

The court refused so to charge the jury; to which ruling and decision of the court in refusing to charge the jury as so requested the defendant then and there, in open court during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

And thereupon the defendant, by its counsel, then and there, in open court during the trial, duly excepted to that part of the charge wherein the court charged the jury: "As to these two defences, gentlemen, it suffices for me to say that I rule against the defendant, and instruct you that they are not sustained by the proofs of the case," and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

201 And thereupon the defendant, by its counsel, then and there, in open court during the trial, duly excepted to that part of the charge wherein and whereby the court charged the jury: "The plain, simple question is presented for your consideration and determination, was Ferguson insane or did he act under an insane impulse at the time he committed suicide?" on the ground that the said part of the charge is not correct in law, and on the ground that there is no evidence in this case whatever under which any theory of an impulse can be formed, as an impulse is an instantaneous motion and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

And thereupon the defendant, by its counsel, then and there, in open court during the trial, duly excepted to that portion of the charge wherein and whereby the court charged the jury: "I have said that the single and simple question for you to determine was whether or not Israel Ferguson

202 was insane or acting under an insane impulse at the time he took his own life," on the same grounds on which the last exception was based; and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

And thereupon the defendant, by its counsel, then and there, in open court during the trial, duly excepted to that part of the charge wherein and whereby the court charged the jury: "And that from that time until the day of his death the deceased was to a greater or less extent despondent, depressed, unhappy, melancholy," on the ground that the evidence shows such to have been the fact only on isolated occasions, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

And thereupon the defendant, by its counsel, then and there, in open court during the trial, duly excepted to that part of the charge wherein and whereby the court charged the jury: "It is for you to say, gentlemen, whether this state of mind amounted to unsoundness of mind,"

203 and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

And thereupon the defendant, by its counsel, then and there, in open court during the trial, duly excepted to that part of the charge wherein and whereby the court charged the jury: "Because if his reasoning faculties

were so far impaired that he could not fairly estimate the moral consequences, the moral complexion of the act, even though he could reason sufficiently well to prepare with great deliberation and to execute with great success his design, nevertheless, within the authority which I have read, he was so far insane that the plaintiff is entitled to recover upon this policy," and prayed that its exception might be allowed by the court and made part of the record of the case, which was done and ordered accordingly.

The counsel for the plaintiff and defendant respectively then stipulated that if plaintiff is entitled to recover at all in this action, he is entitled to recover the sum of $11,348.78.

204 The jury thereupon rendered their verdict as follows: "We find for the plaintiff for the amount claimed."

Wherefore, inasmuch as the rulings and decisions aforesaid do not appear by the record in the case, the defendant, by its counsel, prayed that the said judge holding said court would set his hand and seal to this bill of exceptions containining the several rulings and decisions so excepted to as aforesaid, and order the same to be made a part of the record in the case; and thereupon, at the request of said counsel for the defendant, in accordance with the law and practice of this court, the said judge did then and there, in open court during said term, and before the entry of judgment upon the verdict, sign and seal this bill of exceptions, and ordered the same to be made a part of the record of the case.

(S'g'd) WM. J. WALLACE,
District Judge.

205 (Endorsed:) United States circuit court, southern district of New York. John G. Broughton, as substituted trustee under the deed of Ellenora A. Ferguson, vs. The Manhattan Life Insurance Company. Bill of exceptions. Fellows, Hoyt & Schell, att'ys for The Man. Life Ins. Co., plaintiff in error, 158 Broadway, New York.

Filed July 20th, 1880, as per order of court. John I. Davenport, clerk.

206 Supreme Court of the United States.

JOHN G. BROUGHTON, AS SUBSTITUTED TRUSTEE under the deed of Ellenora A. Ferguson, def't in error,
against
THE MANHATTAN LIFE INSURANCE COMPANY, plain. in error.

Of October term, in the year of our Lord 1880.

Afterwards, to wit, on the 2nd Monday of October term, 1880, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, came The Manhattan Life Insurance Company by Fellows, Hoyt & Schell, its attorneys, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid,

207 there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said John G. Broughton, as substituted trustee under the

deed of Ellenora A. Ferguson, and against the said The Manhattan Life Insurance Company, whereas by the law of the land the said judgment ought to have been given for the said The Manhattan Life Insurance Company and against the said John Broughton, as substituted trustee under the deed of Ellenora A. Ferguson. And the said The Manhattan Life Insurance Company prays that the judgment aforesaid for the errors aforesaid, and manifold other errors in the record and proceedings aforesaid, may be reversed, overruled, and altogether held for nothing, and
208 that it may be restored to all things which it hath lost by occasion of the said judgment, &c.

FELLOWS, HOYT & SCHELL,
Att'ys for Plain. in Error.

(Endorsed): Supreme Courtof the United States. John G. Broughton, as substituted trustee under the deed of Ellenora A. Ferguson, def't in error, against The Manhattan Life Insurance Company, plain. in error. Orig. assignment of errors. Fellows, Hoyt & Schell, attorneys for plain. in error, 158 Broadway, N. Y. City.

Due and timely service of a copy of the within is hereby admitted. New York, Sept. 22, 1880.

ERASTUS F. BROWN,
Att'y for Def't in Error.

U. S. circuit court. Filed Sept. 22, 1880. John I. Davenport, clerk.

209 Supreme Court of the United States.

JOHN G. BROUGHTON, AS SUBSTITUTED TRUSTEE under the deed of Ellenora A. Ferguson, def't in error
against.
THE MANHATTAN LIFE INSURANCE COMPANY, pl'ff in error.

Of October term, in the year of our Lord 1880.

And afterwards, to wit, on the second Monday of October, in October term, 1880, the said John G. Broughton, as substituted trustee under the deed of Ellenora A. Ferguson, by Erastus F. Brown, his attorney, freely comes here into court and says that there is no error either in the record and proceedings aforesaid or in the giving of the judgment afore-
210 said, and he prays that the same Supreme Court of judicature, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

ERASTUS F. BROWN,
Attorney for Defendant in Error.

(Endorsed:) Supreme Court of the United States. John G. Broughton, as substituted trustee under the deed of Ellenora A. Ferguson, def't in error, against The Manhattan Life Insurance Company, plaintiff in error.

Joinder in error. Erastus F. Brown, att'y for def't in error, 76 Nassau st., N. Y. City.

211 Due and timely service of a copy of the within is hereby admitted. New York, Sept. 22, 1880.

FELLOWS, HOYT & SCHELL,
Att'y for Plain. in Error.

U. S. circuit court. Fled Sept. 22, 1880. John I. Davenport, clerk.

212 Circuit court of the United States of America, for the southern district of New York, in the second circuit.

JOHN G. BROUGHTON, AS SUBSTITUTED TRUSTEE under the deed of Ellenora A. Ferguson, plaintiff,
vs.
THE MANHATTAN LIFE INSURANCE COMPANY, defendant.
} Bond for damages and costs.

Know all men by these presents that we, The Manhattan Life Insurance Company and Henry Stokes, are held and firmly bound unto the above-named John G. Broughton, as substituted trustee under the deed of Ellenora A. Ferguson, in the sum of twelve thousand five hundred dollars, to be paid to the said John G. Broughton, as, &c., for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, and administrators and successors, jointly and severally, firmly by these presents. Sealed with our seals, and dated the third day of August, in the year of our Lord one thousand eight hundred and eighty.

Whereas the above-named The Manhattan Life Insurance Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York;

Now, therefore, the condition of this obligation is such that if the above-named The Manhattan Life Insurance Company shall prosecute its writ of error to effect, and answer all damages and costs if it doth fail to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HENRY STOKES, [SEAL OF COMPANY.]
President.
HENRY STOKES. [L. S.]

Sealed and delivered and taken and acknowledged by The Manhattan Life Ins. Co., by its president, & by Henry Stokes, this third day of August, 1880, before me.

JOHN C. HICKIE,
Notary Public, N. Y. Co.

213 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Henry Stokes, the surety in the foregoing bond, being duly sworn, doth depose and say that he resides and is a freeholder in the city of New York; that he is worth the sum of twenty-five thousand dollars over and above all his just debts and liabilities.

HENRY STOKES.

Sworn to this third day of August, A. D. 1880, before me.

JOHN C. HICKIE,
Notary Public, N. Y. Co.

(Indorsed:) U. S. circuit court for the southern district of New York. John G. Broughton, as substituted trustee under the deed of Ellenora A. Ferguson, plaintiff, vs. The Manhattan Life Insurance Company, defendant. Bond for damages and costs on writ of error. Fellows, Hoyt & Schell, defendant's proctors, 158 Broadway, New York City.

The within bond is approved, August 5th, 1880.

SAM'L BLATCHFORD,
Circuit Judge.

U. S. circuit court. Filed Aug. 6, 1880. John I. Davenport, clerk.

214 UNITED STATES OF AMERICA, *ss:*

To John G. Broughton, as substituted trustee under the deed of Ellenora A. Ferguson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Manhattan Life Insurance Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Blatchford, judge of the circuit court of the United States for the southern district of New York, this 5th day of August, in the year of our Lord 1880.

SAM'L BLATCHFORD,
Circuit Judge.

215 (Indorsed:) Supreme Court of the United States. John G. Broughton, as substituted trustee under the deed of Ellenora A. Ferguson, def. in error, vs. The Manhattan Lfe Insurance Company, plaint. in error. Citation upon writ of error to the U. S. circuit court for the southern district of New York. Fellows, Hoyt & Schell, att'ys for plain. in error, 158 Broadway, New York City.

Due service, this day, of a copy of the within citation, is hereby admitted.

Dated New York, Aug. 6, 1880.

ERASTUS T. BROWN,
Pl'ff's Att'y.

(Stamp.) U. S. circuit court. Filed Aug. 6, 1880. John I. Davenport, clerk.

(Indorsement on cover:) No. 308. The Manhattan Life Insurance Company, plaintiff in error, vs. John G. Broughton, as substituted trustee under the deed of Ellenora A. Ferguson. S. New York C. C. U. S. Filed 6th October, 1880.

109-121

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 63.

THE MANHATTAN LIFE INSURANCE CO.,

Plaintiff in Error,

vs.

JOHN G. BROUGHTON, &c.

Brief of Plaintiff in Error.

JAMES OTIS HOYT,

Of Counsel.

Evening Post Job Printing Office, N. Y.

Supreme Court of the United States.

THE MANHATTAN LIFE INSURANCE,
Plaintiff in Error,

vs.

JOHN G. BROUGHTON, AS SUBSTITUTED TRUSTEE, &C.,
Defendant in Error.

No. 63.

Brief of Plaintiff in Error.

STATEMENT.

On the 15th of June, 1864, the Manhattan Life Insurance Company insured the Life of Israel Ferguson in the sum of $10,000, which was payable to his wife, Ellenora A. Ferguson, in ninety days of due proof of his death.

It was provided in said policy that if Israel Ferguson should die by suicide that the policy should be null, void and of no effect.

Israel Ferguson hanged himself in Central Park in the City of New York, on the 14th day of April, 1876.

His widow brought an action against the company upon the policy in October, 1876, in the Court of Common Pleas in the City of New York, which was was tried before Mr. Justice Larremore, in December, 1876. Upon the trial plaintiff proved the policy, the death of the insured, and notice to the company, and rested. The com-

pany proved that the insured died by suicide, and rested. The plaintiff then offered evidence of his acts and conduct, and offered expert testimony which she claimed showed insanity.

The learned judge, following the rule of the New York Court of Appeals, dismissed the complaint, saying: "The *onus probandi* is on the plaintiff to show that he, the deceased, had not mind enough left to know that death would result from the act he was about to commit. You have got to make that out. When you make a policy, one of the provisions of which is that you cannot recover when a man dies by his own hand, then the only way you can recover is to show that the man was insane. The only way you can make that out is by showing a totally abnormal crazy condition of the mind, so that he did not know the physical consequences of the act. The facts of this case all might exist with the entire sanity of any individual. You have grouped all the facts together and tried to show from that that the man was insane. That is not the kind of insanity the law contemplates. The law says, you can take out a policy provided you do not die by your own hand, and if you die by your own hand, your relatives must make out a *prima facie* case that death resulted from an act committed while the party was insane, not from impulse, but that the man was actually insane, and had not mind enough to know what he was doing. It is a case of peculiar hardship, but it has been tried with great fairness on the part of the defendant and with great liberality" (Record, p. 25).

Pending this action in the Court of Common Pleas, Mrs. Ferguson had assigned the policy to John J. Nestell in trust to pay a claim of $2,000 and interest, and the necessary expenses of collecting the policy, and to invest the balance and pay the income to her during her life, and such portion of the principal, as the parties to the assignment might deem necessary for her support (Record, p. 13).

After Mrs. Ferguson failed in her suit in the Court of Common Pleas, her trustee residing in New York brought an action in the Supreme Court of the State of New York against Mrs. Ferguson to be relieved of his office of trust. Mrs. Ferguson interposed an answer admitting the allega-

tions of the complaint and prayer that John G. Broughton might be substituted as trustee in place of Nestell, and a decree to that effect was entered on the 27th day of May, 1879 (Record, p. 15).

Then John G. Broughton, as such substituted trustee, brought this action in the United States Circuit Court for the Southern District of New York, alleging that he is a citizen of New Jersey.

The action was tried before Mr. Justice Wallace and a jury in April, 1880, and a verdict rendered for plaintiff, who took judgment in the sum of $11,607 (Record, p. 8).

From this judgment the present writ of error was taken to this court.

Assignment of Errors.

Plaintiff in error says that the court below erred :

I.—In refusing to dismiss the action on the ground that both parties were citizens of the State of New York, and the court had no jurisdiction (Rec., p. 18, fol. 62, also p. 57, fol. 182).

II.—In refusing to direct a verdict for defendant on the ground that the same issues had been previously tried and decided in favor of the defendant in the State court, and that the judgment was a bar to this action (Rec., p. 25, fol. 82, also p. 57, fol. 183).

III.—In refusing to strike out the last clause of witness' answer, to wit : "I mean a far-off glassy look as though the mind was dwelling on nothing" (Rec., p. 42, fol. 136).

IV.—In overruling the objection to the hypothetical question, purporting to show the condition of insured—on the

ground that it was immaterial and incompetent, the question of sanity having been decided as between these parties by the State court (Rec. p. 45, foi. 145).

V.—In refusing to instruct the jury as requested, "to render a verdict for the defendant on the ground, that on the facts of the case it is proved and undisputed that said Israel Ferguson died by suicide, and there is no evidence in the case that at the time he took his life he was so far insane that he did not know the physical consequences of his own act, or had lost all control of his will" (Rec., p. 49, fol. 159).

VI.—In overruling the objection that the following question was unfair and not competent on cross-examination:

"Q. I will read you an extract, because it bears on the question. These views are contained in an opinion delivered by Mr. Justice Woodward in the Supreme Court of the State of Pennsylvania. It is the case of the Connecticut Mutual Life Insurance Company *vs.* Grover. 'But the defendants relied upon the fact that the steps of Mr. Borlean to destroy his life were consciously intelligent, and that he knew what the consequences of his taking the poison would be. There is no doubt that he had such knowledge. His very purpose was to kill himself. Such a degree of intelligence may well co-exist with faculties so distorted, and a mind so shattered by long continued suffering as to inspire a morbid impulse, the nature of which the weakened judgment cannot measure, and the execution of which the uncertain and feeble will cannot restrain. Almost every insane man knows that food will satisfy hunger, and that water will quench thirst. He is able to realize that fire will burn him, that blood will follow the blow of a knife, and that he will feel pain if his flesh is torn, and acts consciously through his life on such knowledge. It survives often among the instincts of a man after the intellect is wrecked.'

He says in McElroy's case (Houston, *J.*): 'All treatises on insanity and most reports of trials relating to insane persons, show that a total loss of reason and memory is unknown to courts and physicians, unless in cases of delirium from diseases of absolute frenzy, and yet Commissions of Lunacy are constantly found and wills and deeds set aside on the ground of insanity.' I ask you whether, in your experience, the views here set forth are in harmony with your knowledge, based on your experience" (Rec., p. 54, fol. 172)?

VII.—In overruling the objection to the following question as being only an isolated case, the facts in evidence not warranting the question:

"Q. What do such facts as these indicate, referring to the hypothetical question which was put, of the condition of the deceased at the early period of his life; of the interest which he took in his family; of his cordiality toward his family; of that which took place which led him, at home, to keep aloof from his family and to lead him to retire to his room, and in connection with that the fact that the room which he occupied was dark, and that he would then prostrate himself, clothes and hat on, on the bed with his head down? In your experience as a physician, doctor, if somebody should apply to you as a physician and say: 'This is the condition of my friend. Now, we want your experience, as an experienced and practical gentleman—one who stands high in the community,' what would be your impression from a statement made by a member of the family to you of such a fact as that"? (Rec., p. 54, fol. 175).

VIII.—In overruling the objection as not being what actually occurred, the following question:

"Q. Doctor, if you should meet a gentleman in the street whom you knew well, and was in the habit of taking him by the hand and shaking it, and with whom you were on such intimate terms as to call him Israel, and

when you should say, 'Good morning, Israel,' he should reply only, 'I've got 'em,' and rush across the street, what would be the impression on your mind?" (Rec., p. 55, fol. 176).

IX.—In refusing to direct the jury to render a verdict for the defendant upon the ground that it being proven that Israel Ferguson died by suicide, there was not evidence sufficient to show that he was insane or to render defendant liable upon its contract (Rec., p. 57, fol. 184).

X.—In refusing to charge the jury as requested as follows: "That if said Israel Ferguson died by suicide, the plaintiff cannot recover unless he has proven to your satisfaction that such act of self-destruction was not Ferguson's voluntary and willful act; and that he had not at the time sufficient power of mind and reason to understand the physical nature and consequences of such act, and did not have at the time a purpose and intention to cause his own death by the act" (Rec., p. 61, fol. 196).

XI.—In refusing to charge, as requested, as follows: "That the burden of proof as to this question is upon the plaintiff, and if upon the evidence, the question is left in doubt, the plaintiff cannot recover" (Rec., p. 61, fol. 196).

XII.—In refusing to charge, as requested, as follows: "That unless the evidence established that Israel Ferguson did not commit suicide consciously and voluntarily, the plaintiff cannot recover" (Rec., p. 62, fol. 197).

XIII.—In refusing to charge, as requested, as follows: "That if he thus committed it, it is immaterial whether he was capable of understanding its moral aspects or of distinguishing between right and wrong" (Rec., p. 62, fol. 197).

XIV.—In refusing to charge as requested as follows: "That if Ferguson was insane he must have been insane to such an extent as to render him unconscious of the nature and effect of the act of suicide to entitle the plaintiff to recover upon the policy. Proof that he is insane only is not sufficient" (Rec., p. 62, fol. 198).

XV.—In refusing to charge as requested as follows: "That if the jury find from the evidence that Ferguson, impelled from any cause, whether domestic unhappiness or financial trouble, or both, voluntarily and with sufficient reason to know the consequences of the act, committed suicide, the plaintiff cannot recover" (Rec., p. 62, fol. 198).

XVI.—In refusing to charge as requested as follows: "That the only legal test of insanity is delusion" (Rec., p. 62, fol. 199).

XVII.—In refusing to charge as requested as follows: "That there is no evidence in this case of any delusion, and, in the absence of such evidence, the jury cannot infer the existence of any delusion" (Rec., p. 62, fol. 199).

XVIII.—In refusing to charge as requested as follows: 'That if circumstances existed that preyed upon Ferguson's mind to such an extent as to lead him to prefer death to life, and in that state of mind he voluntarily and consciously destroyed himself, it was a cause of death by suicide within the meaning of the contract, and the defendant is not liable" (Rec., p. 62, fol. 200).

XIX.—In charging the jury as follows:

"As to these two defenses, gentlemen, it suffices for me to say that I rule against the defendant, and instruct you

that they are not sustained by the proofs of the case" (Rec., p. 63, fol. 201).

XX.—In charging the jury as follows:

"The plain, simple question is presented for your consideration and determination, was Ferguson insane or did he act under an insane impulse at the time he committed suicide? On the ground that said part of the charge is not correct in law, and on the ground that there is no evidence in the case whatever under which any theory of an impulse can be formed as an impulse, is an instantaneous motion (Rec., p. 63, fol. 201).

XXI.—In charging the jury as follows:

"I have said that the single and simple question for you to determine was, whether or not said Ferguson was insane or acting under an insane impulse at the time he took his own life," on the same grounds (Rec., p. 63, fol. 202).

XXII.—In charging the jury as follows:

"And from that time until the day of his death the deceased was, to a greater or less extent, despondent, depressed, unhappy, melancholy," on the ground that the evidence shows such to have been the fact only on isolated occasions (Rec., p. 63, fol. 202).

XXIII.—In charging the jury as follows:

"It is for you to say, gentlemen, whether this state of mind amounted to unsoundness of mind."

XXIV.—In charging as follows:

"Because, if his reasoning faculties were so far impaired that he could not fairly estimate the moral consequences, the moral complection, of the act, even though he could reason sufficiently well to prepare with great

deliberation and to execute with great success his design, nevertheless, within the authority which I have read he was so far insane that the plaintiff is entitled to recover upon this policy."

Rec., p. 64, fol. 203.

POINTS.

I.

The expression, "in case he shall die by suicide," inincludes all cases of voluntary self-destruction. If a man takes his life, knowing and intending the consequences of his act, it is his act within the meaning of the policy, and it is immaterial whether he did not know the difference between right and wrong; but if he was so insane that he did not know that his act would ki l him, and did not intend it should, it was not his act within the meaning of the policy.

The question is whether the self-killing was his own act, and not whether it was his responsible act.

This is the law of New York, the *locus* of the contract.

Van Zandt *vs.* Mut. B. L. I. Co., 55 New York, 169.

McClure *vs.* M. L. I. Co., 55 *id.*, 651.

De Gogorza *vs.* Knickerbocker I. Co., 65 *id.*, 232.

Weed *vs.* Mut. Ben. L. I Co., 70 *id.*, 561.

Of Massachusetts,

Dean *vs.* Am. I. Co., 4 Allen, 96.

Cooper *vs.* Ins. Co., 102 Mass., 227;

II

There is no evidence of any insane impulse in the case. On the contrary, the evidence shows a deliberately planned and intelligently executed act of suicide.

III.

The evidence shows that the plaintiff was made trustee by the Supreme Court of the State of New York, and for the purpose of bringing an action in the United States Court, Mrs. Ferguson having failed to recover under the New York rule (p. 17, fol. 56).

The court below had no jurisdiction; or if the plaintiff was a citizen of New Jersey, it should not have exercised its jurisdiction, the appointment having been made merely to bring the action where it was supposed a more favorable rule existed than in New York.

IV.

The same issues involved in this action were tried in the case in the Court of Common Pleas for the City of New York, and the judgment in that case was a bar to the present one and an estoppel.

Krekeler *vs.* Ritter, 62 N. Y., 372.

In the event of a recovery by plaintiff, the amount of the judgment in the Court of Common Pleas should be deducted.

Judgment below should be reversed.

JAMES OTIS HOYT,
Counsel for Plaintiff in Error.

109-121

SUPREME COURT U.S.
FILED
OCT 17 1893
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

THE MANHATTAN LIFE INSURANCE COMPANY,
Plaintiff in Error,

against

JOHN G. BROUGHTON, AS SUBSTITUTED TRUSTEE UNDER THE DEED OF ELLENORA A. FERGUSON,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ERASTUS F. BROWN,
Of Counsel for Defendant in Error.

Evening Post Job Printing Office, N. Y.

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JAMES OTIS HOYT,
Counsel for Plaintiff in Error.

109-121

SUPREME COURT U.S.
FILED
OCT 17 1883
JOHN H. McKENNEY, CLERK

SUPREME COURT OF THE UNITED STATES.

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Plaintiff in Error,

against

JOHN G. BROUGHTON, AS SUBSTITUTED TRUSTEE UNDER THE DEED OF ELLENORA A. FERGUSON,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ERASTUS F. BROWN,
Of Counsel for Defendant in Error.

Evening Post Job Printing Office, N. Y.

Supreme Court of the United States.

THE MANHATTAN LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

JOHN G. BROUGHTON AS SUBSTITUTED Trustee, under the Deed of Ellenora A. Ferguson,
Defendant in Error.

Statements of Facts.

1. On the 15th day of June, A. D., 1864, the Manhattan Life Insurance Company of New York issued a policy of insurance to Ellenora A. Eerguson upon the life of her husband Israel Ferguson, for the sum of ten thousand dollars (Record, page 9, fol. 32).

2. Premiums were duly paid upon the said policy of insurance up to the 15th day of July, 1876 (Record, page 11, fol. 39).

3. The only provision in the policy of importance in the consideration of this case is the following:

"In case he" (said Israel Ferguson) "shall die by suicide * * * * then this policy shall be null and void, and of no effect."

4. Israel Ferguson died at the City of New York on the 14th day of April, 1876 (Record, page 18, folio 59).

5. The Manhattan Life Insurance Company refused to pay the insurance money on the ground that said Israel Ferguson died by suicide.

6. Thereupon an action was brought by said Ellenora A. Ferguson against the Manhattan Life Insurance Company on or about the 26th day of October, 1876, to recover upon the said policy of insurance in the Court of Common Pleas in and for the City and County of New York (Record, page 19, folio 63).

7. The case was duly brought to trial before Hon. Richard L. Larramore, one of the judges of said court *and a jury* (Record, page 24, folio 77).

8. Evidence was taken on the part of the plaintiff and on the part of the defendant; and plaintiff rested. Whereupon upon motion of counsel for the defendant, the court granted JUDGMENT OF NONSUIT, the court having overruled the request of plaintiff's counsel that the case be submitted to the jury on the evidence.

In denying such request the court said, "*I deny your motion to have the case submitted, and grant the motion for the nonsuit*" (Record, page 25, folios 79 to 81, inclusive).

This nonsuit was based on the ground that there was not evidence sufficient to prove that the deceased had not mind enough to know the *physical consequences* of his act (Record, page 25, folios 79 to 81).

9. Defendant's counsel was dissatisfied with the record of said Court of Common Pleas showing that the plaintiff was nonsuited (Record, page 24, folios 76 and 77), and moved the court to have the record amended so that it should read that the case was "dismissed on the merits," which motion to so amend the minutes was denied by the court(Record, page 25, folios 79 and 80).

10. This judgment of nonsuit the defendant below, in the United States Circuit Court, claimed was a bar to the present action, and moved the court to direct a verdict for said defendant on this ground, which request was refused, to which refusal the defendant excepted (Record, page 57, folio 183).

11. One John J. Nestell, having been appointed trustee of the claim of said Ellenora A. Furguson under this policy subsequent to the commencement of said action in the Court of Common Pleas, and not having entered upon the duties of his trust, did on or about the 26th of May, 1879, bring an action in the Supreme Court of the State of New York to be relieved from the duties of his said trust. Said Ellenora A. Ferguson appeared in said action and consented to such release and prayed that the renunciation of said John J. Nestill might be accepted and that he might be relieved from his said duties, and further prayed that John G. Broughton, the defendant in error herein, might be appointed trustee in his place and stead. Whereupon the said Supreme Court, by judgment duly given, removed said John Jay Nestell as such trustee and filled the vacancy then existing caused by such removal by the appointment of John G. Broughton aforesaid as substituted trustee (Record, pages 12 to 16, inclusive).

12. Said John G. Broughton, as such substituted trustee, brought this present action in the Circuit Court of the United States for the Southern District of New York, he being at such time and previous thereto a citizen of the State of New Jersey, residing in Bloomfield, in said State of New Jersey, having resided there with his family for a period of twelve years prior thereto and voted there (Record, page 16, folio 55).

13. Said Ellenora A. Ferguson was also at such time and previous thereto a citizen of said State of New Jersey (Record, page 18, folios 59 and 60).

14. The Manhattan Life Insurance Company, being a corporation created by and under the laws of the State of New York, and a citizen of the State of New York (Record, page 4, folio 12).

15. The defendant below in the United States Circuit Court moved the court upon this state of facts to dismiss the action, on the ground of want of jurisdiction with parties to the suit, being citizens of the same State, to wit, the State of New York, which request was refused (Record, page 57, folio 182).

This request was based upon the suggestion of counsel that as John G. Broughton had been appointed trustee by the Supreme Court of the State of New York, he became thereby an officer of the court, and constructively a citizen of the same jurisdiction, namely, the State of New York.

16. This action having been brought to trial in the U. S. Circuit Court, evidence was introduced by the plaintiff below establishing the fact of the death of said Israel Ferguson (Record, page 17, folio 58).

17. Defendant below then introduced evidence for the purpose of establishing that said Israel Ferguson died by suicide (Record, pages 26 and 27).

18. The plaintiff below then introduced evidence to establish the fact that said Israel Ferguson was insane at the time of his death, in support of the plaintiff's right to recove (Record, page 29, folio 93, to page 49, folio 159, inclusive).

19. Thereupon the defendant below, by its conusel, requested the court to instruct the jury to render a verdict for the defendant, on the ground that on the facts in the case it is proved and undisputed that said Israel Ferguson died by suicide, and there is no evidence in the case that at the time he took his life he was so far insane that he did not know the physical consequences of his act, or had lost all control of his will.

The court refused so to instruct the jury, to which refusal the defendant excepted (Record, page 49, folos 158 and 159).

20. The defendant below then examined in its behalf George C. S. Choate, M. D., claimed to be an expert in mental diseases, who was cross-examined on the part of plaintiff.

Thereupon the defendant rested and testimony was closed (Record, page 49, folio 159, to page 57, folio 182, inclusive).

21. The defendant below having by its counsel renewed its motions, which were again overruled by the court, and the court having charged the jury, and the case having been submitted, thereupon the jury rendered a verdict for the plaintiff below for the amount claimed, which was stipulated to be for the sum of eleven thousand three hundred and forty-eight $\frac{78}{100}$ dollars, in the event of plaintiff's recovery (Record, page 57, folio 182, to page 64, folio 204, inclusive).

Upon the exceptions set forth in the foregoing statement of facts, and the additional exceptions set forth in the following points, and the rulings of the court thereupon, the defendant below brings this case before this court by writ of error to the Circuit Court of the United States, for the Southern District of New York.

First Point.

Exception was taken to the refusal (of the judge in the court below), to direct a verdict for defendant on the ground, as was claimed, that it appeared by the evidence and was established that the issues and questions in controversy in this action had been formerly tried and adjudicated in the New York Common Pleas Court, and that the trial and adjudication were final and conclusive against the plaintiff below, and a bar to this action (Record, page 25, fol. 82).

1. The defendant below on the trial in the Circuit Court, put in evidence the judgment roll in said action in the Court of Common Pleas.

The minutes of the court, forming a part of said judgment roll, read: "Motion for nonsuit granted and complaint dismissed," and the *postea* also forming a part of said judgment roll, read: "And the said justice, upon motion of defendant's counsel, having granted a nonsuit and dismissed the complaint," &c. (Record, page 24, fols. 76-77).

2. For the purpose of showing that there can be no question as to the character of this judgment in said Court of Common Pleas, reference will be made to the proceedings had in said court, constituting a part of the record herein.

The plaintiff's counsel in said action made the following request: "I have to request that the case be submitted to the jury on the evidence in the case," to which request the court replied: "I deny your motion to have the case submitted, and grant the motion for the nonsuit" (Record, page 25, fol. 81.)

If anything further is necessary to show the character of said judgment in the Court of Common Pleas, the admission of the attorney for the defendant below will be sufficient.

"Defendant's counsel admits that a motion was made to have the words 'on the merits' inserted in the minutes, and that Judge Larrimore (the justice of the New York Court of Common Pleas, before whom the case was tried, said "Let it stand as it is" (Record, page 25, folio 80).

The usual and proper form of the judgment of non-suit is "that the complaint be dismissed."

Hoyt *v.* Beard, 33 Barb., N. Y., page 357.

3. We here have the minutes of the court, the direction of the justice, shown by the admission of the defendant below, and also the *postea* of the judgment entered by the defendant that the judgment in the New York Court of Common Pleas was a judgment of nonsuit merely.

4. The action in the Court of Common Pleas was a common law action, and was triable by and before a jury. And an examination of the minutes of the action in said court forming a part of the judgment roll aforesaid, show that a jury was in actual attendance, had been duly called and sworn, and that the evidence in the case was taken before them (Record, page 23, fol. 75; page 24, fol. 76).

5. The case was neither submitted to a jury upon the evidence, neither was the jury directed to find for the defendant below (Record, page 25, fols. 81 and 82).

6. Upon the evidence bearing on this point, set forth at length in the Record, it is only necessary to consider whether

this judgment of nonsuit was *res adjudicata*, and it is confidently submitted that such a judgment in a New York State Court has no such force or affect.

A judgment of nonsuit leaves the parties to sue again and is no bar, such was always the rule in actions at law, in equity suits the rule is different. And it has been held in some cases that where in a common law action the trial is had by consent before a judge without a jury, a judgment of non-suit may have the same effect as a suit in equity.

But under no circumstances in a common law action, where the trial is before a jury, will a judgment of non-suit be deemed final, whether entered before or at the trial, and even if such a judgment should be entered by the court upon an agreed state of facts, it would not have the force of an estopple.

Coit *v.* Beard, 33 Barb., N. Y. Supreme Court Rep., page 357.

Graham's N. Y. Practice, Title Non-suit, page 269 at page 270.

Wilds *v.* The Hudson River R. R. Co., 24 N. Y. Rep., foot of pages 437 and 439.

Pratt *v.* Hull, 13 John., 334.

Audubon *v.* Excelsior Ins. Co., 27 N. Y. Rep., at page 218.

The People *v.* Valis, 36 N. Y. Rep., 459.

Harrison *v.* Wood, 2 Duer, 50.

Wheeler *v.* Buckman, 51 N. Y. Rep., 391.

Dexter *v.* Clark. 35 Barb. 271

Wright *v.* Marshall, 3 Daly 329 at 331.

The People *v.* Smith, 51 Barb., 360.

Freeman on Judgments, 2 Ed., sect. 261, Title Non-suit.

Derby *v.* Jacques, 1 Clifford, 425 at 432.

Homer *v.* Brown, 16 How. U. S., 354 at 365.

Second Point.

Exception was taken by defendant below to the refusal of the court below to dismiss the action, "on the ground of want of jurisdiction in the court, for that it appeared by the records read in evidence and by the pleadings and proofs in this action that the plaintiff herein was not at the time of the commencement of this action, nor since, a citizen of the State of New Jersey, and it did appear that the controversy in this action was and is between citizens of the same state, to wit, the State of New York" (Record, p. 18, fol. 61.)

1. There is no claim that the plaintiff did not actually reside in the State of New Jersey, for the uncontradicted evidence in the case is that, at the time of the bringing of the action and for a period of twelve years prior thereto, he had resided with his family at Bloomfield, in said State of New Jersey, and voted there, and had at no time subsequent to the bringing of this action changed his said residence, and was still residing there while the cause was on trial in the court below (Record, p. 16, fols. 541–5.)

2. But the defendant based his exception on the ground that as said John G. Broughton had been appointed such trustee by the Supreme Court of the State of New York, he became thereby an officer of the court and, constructively, a citizen of the same jurisdiction, namely, the State of New York.

3. The facts upon which this claim was based are as follows:

One John Jay Nestell had been appointed trustee for the *cestui qui trust*, Ellenora A. Ferguson, had accepted the trust, but had not acted under it. He desired to be released from the duties of his trust, and brought an action in the Supreme Court aforesaid to be released.

Said Supreme Court granted the prayer of his petition, and removed him as said trustee, and, thereupon, upon the petition of the *cestui qui trust* Ellenora A. Ferguson, said court appointed the plaintiff (below) John G. Broughton, as substituted trustee, under the deed of Ellenora A. Ferguson, to fill the

vacancy then existing, caused by the resignation and removal of said John Jay Nestell, who had been removed as aforesaid (Record, p. 15, fols. 51–52).

4. Said John G. Broughton was not an officer of the court, but to all intents and purposes a trustee appointed by Ellenora A. Ferguson, the *cestui qui trust*.

Said Ellenora A. Ferguson had a beneficial interest under said trust. The trust deed providing that, after the payment of certain smaller sums, which included the payment of expenses incurred in collecting the moneys due under the policy, the trustee should "invest the balance of all moneys collected upon good and sufficient security, and to pay the income thereof to the party of the first part" (said Ellenora A. Ferguson) "during her natural life, and such portion of the principal as the parties of the first and second part may deem necessary to be applied to the maintenance and support of the party of the first part during such time" (Record, p. 13, fols. 45 and 46).

She had a right to be heard, and the court appointed said John G. Broughton, upon her prayer and petition (Record, p. 14, fol. 48.)

The fact that the intervention of the court was necessary, in no manner militated against the trust being a personal trust.

4. John Jay Nestell, the trustee so removed, had under said trust no assignable interest. The trust was strictly personal and confidential, like to the duties imposed on an executor or administrator.

Having originally accepted the trust, he was compelled to apply the court in order to be removed.

Lewin on Trusts, 6th ed., pages 174 to 178.
Tiffany and Bullard on Trusts, page 527, and numerous cases cited in Note 3.
2 Spencer's Equity Jurisprudence, 918.
Diefendorf *v.* Spraker, 10 New York Rep., 246.
Briggs *v.* Davis, 20 New York Rep., page 15.
Same *v.* Same, 21 New York Rep., 574.
Thatcher *v.* Candee, 4 Abbot's, N. Y. Court of of Appeals Decisions, 387.
Cruger *v.* Halliday, 11 Paige, 319.
Brennen *v.* Wilson, 71 New York Rep., 502.

5. The Supreme Court (formerly Court of Chancery) had general jurisdiction to displace said John Jay Nestell and to substitute said John G. Broughton in his place, and to confer upon him all the powers of the original trustee.

The People *v.* Norton, 9 N. Y. Rep, 176.
Leggatt *v.* Hunter, 19 N. Y. Rep., 445.
Buckler *v.* Buckler, 1 Keys, N. Y. Court of App. Rep., page 141.
Chatauqua County Bank *v.* Risley, 19 N. Y. Rep., 369.

6. It was discretionary with the New York Supreme Court to appoint as trustee a resident of another State. Ellenora A. Ferguson resided in the State of New Jersey, and was a citizen of that State. There is no dispute as to this fact (Record, page 18, fols. 59, 60, 61).

When the *cestui que trust* resides abroad it may be proper to appoint trustees in the same jurisdiction with the beneficiary. The New York Supreme Court exercised this discretion, and the court will not review it.

Perry on Trusts, Section 297.
Amery *v.* Amery. 5 Otto 90
Grignon's Lessee, *v.* Astor, 2 How. Al. S., 319.

Third Point.

Exception was taken by the defendant below to the refusal of the court "to direct the jury to render a verdict for the defendant," upon the ground that it being proved that Israel Ferguson died by suicide, there was not evidence sufficient to show that he was insane as to render the defendant liable upon the policy" (Record, page 57, folios 183 and 184).

1. It is quite clear that the court should not have directed a verdict for the defendant unless the evidence against the insanity was of such a conclusive character as would have

compelled the court, in the exercise of a sound discretion, to set aside a verdict in favor of plaintiff.

If there was any evidence that the deceased was insane, the judge was not bound to, and could not properly take the case from the jury. This is the rule which has been laid down in this court.

Phœnix Mutual Life Ins. Co. *v.* Doster, 16 Otto, page 32.
Life Ins. Co. *v.* Terry, 15 Wallace, 580.

2. There was unquestionably sufficient evidence of the insanity of the deceased to justify the submission of the case to the jury.

The following extracts from the uncontradicted evidence on part of plaintiff below, taken upon the trial in the Circuit Court sets forth a statement of Mr. Ferguson's condition for a period covering about two years previous to his decease, down to and including the time immediately prior thereto.

The witness Cuming testified :

"I was acquainted with Mr. Israel Ferguson in his lifetime ; my acquaintance with him commenced about eight years previous to his death, and was mostly social ; Mr. Ferguson and I belonged to the same church, and I had in that way a very considerable acquaintance with him, meeting him week after week, and I have also had the pleasure of visiting him at his house ; the man was of a naturally cheerful disposition, a bright, hearty man, walked erect ordinarily, with a clear, open face, and a cheerful greeting for his friends whenever he met them, that was one of the special characteristics of Mr. Ferguson, and to come forward and grasp your hand cheerfully and heartily, * * * and was, in short, a man you would speak of as a jolly, cheerful, hearty man * * * I noticed during the latter part of my acquaintance with him a very decided change in his manner and acts ; I first noticed the change some time about the end of 1874, during the year 1875" (Record, page 29, folios 93 and 94).

During this period referred to by the witness Cuming, the deceased was a prosperous business man. Subsequently, and during the years 1873, and 1874, he sustained heavy business losses (Record, page 30, folio 98 ; page 31, folio 99).

Following this, and on or about the 22d day of August, 1874, Mr. Ferguson's eldest son, upon whom he relied greatly in carrying on his business, died under very distressing circumstances, having fallen from a window, and dying from the effects of this fall a few hours subsequent (Record, page 34, folios 110 to 112).

The witness Hafner, referring to this latter period, testified, "I was employed by him (Ferguson) from 1859 for about fourteen years; I think, steady, up to the time of his death; I noticed a change in Mr. Ferguson; it commenced about after the business loss, and then a greater change was noticed after the death of his son John, who died in 1874; that was his eldest son; *after the death of his son he acted as if he had his senses lost;* before this change took place he was an industrious busness man * * * * was always cheerful, too; after the loss of his property and the loss of his son John he acted careless, did not mind anything any more, didn't even take notice of the men around him; * * * * one time I asked him, 'Mr. Ferguson, what is the matter?' he says, 'My head, my head, my head is all wrong,' he says."

The change exhibited in his domestic relations, as shown by his conduct and appearance when associated with his family, may best be illustrated by the testimony of his daughters, who were examined on behalf of plaintiff below.

The daughter, Nellie Ferguson, being examined, said:

"I am the daughter of Israel Ferguson, deceased; I lived with my father up to the time of his death; before these business troubles and the death of his son, John, he was always pleasant and lively with his family, and seemed to enjoy himself with them always. After his business troubles and the death of his son John, I noticed a decided change in his conduct. He seemed to want to be by himself all the time (Record, page 36, folios 118 and 119). * * * I think he changed in appearance before the death of my brother. There was a gradual change. He had been depressed before that. * * * *This demeanor I have spoken of displayed itself pretty soon after my brother's death, and continued up to the last time I saw him alive* (Record, page 37, folio 121). * * * He went by himself and stayed by himself in a room in the dark. I don't remember that I ever opened the door of the

room and looked in and saw him, but my sisters have. Shortly before his death he was very pale, and looked worried, and he complained a great of his head. * * * He would say that all his trouble was in his head, and when we often suggested to him to go to a doctor to see about it, he would say: "The doctor can't cure me—its no use." At the time of his death he lost his appetite, and was pale, and complained a great deal of his head, and the last morning I saw him I noticed a queer expression about his eyes. It was a sort of wild, unnatural expression. * * * He seemed greatly excited by his manner, and went out in a great hurry" (Record, page 36, folio 120, and page 37, same folio).

And the daughter, Gertrude Ferguson, speaking of her father's conduct and appearance during this period, says: "At or about the time of my father's death he was very much changed, and was very excitable. He looked different, and had a wild expression. He stayed a great deal by himself in his room when he came home from business. He would go to his room and lie on his bed with his hat and overcoat on, and not come out to his meals. * * On the morning of his death he looked different and acted different. He was paler and more excitable. He did not have a natural expression; he lookedwild (Record, page 37, folios 122 and 123).

And to the same effect see testimony of Sarah Ferguson. (Record page 38, folios 124 and 125).

This change in Mr. Ferguson's character and manner was marked and noticeable, and impressed itself even upon those who came in contact with him casually as being far different from his natural condition. It is the testimony of the witness Walker: "I saw him a short period before his death; I was sitting in my office one day, and on looking out of the window saw him pass by, and immediately noticed that he looked very sadly; I cannot describe it in any other way, *so much so that it struck me with amazement*; he looked sad sufficient to attract my attention, and walked the street in a peculiar manner, and that struck me more than his appearance" (Record, page 42, folio 138, page 43, folio 139).

This peculiar gait and appearance upon the street is directly testified to by Catherine Cook, an acquaintance of the family, who met him one day when she was marketing, and was so struck by his appearance that she stopped in her walk,

sat her basket upon the ground, and watched him until out of sight (Record, page 36, folios 117 and 118).

And the witness Southwick, speaking of the unusual conduct of the deceased during this period, says: "I used to meet him every day at the time to which I refer; I met him one morning, and said: 'How are you, Israel?' he said: 'I'm all right; we've got 'em now' (imitating gestures), and rushed across the street, and ran away from me; I noticed in my early acquaintance with him that he was talking to himself often; I suppose he was talking to himself; his lips were moving; I should say this was from six months to two years before his death" (Record, page 32, folio 105, page 33, folio 106).

The witness Sherwood, speaking of Mr. Ferguson during this period, says, among other things: "My opportunities of seeing him were in the store; he sat down in the office and moaned, and would be gloomy" (Record, page 30, folio 98).

How utterly at varience is this with Mr. Ferguson's former character, as described by the witness Cumming.

Mr. Mills, who was Ferguson's partner in business, during this latter period, speaking of this change, says:

"Mr. Ferguson was a very fine looking man, and had a large black eye that was mild and benevolent looking, but it became wild and glassy at times, and he would stare at me when I would be in conversation with him; I know the fact of the death of his son John; I cannot define the effect this had on him; I know I feared to mention his name, because every time it was mentioned, he would act so queer. * * * He did not attend to his business as he did formerly (Record page 39, folio 129, page 40, same folio); Mr. Ferguson for months did not pay any attention to the books at all (Record, page 41, folio 134).

"Mr. Ferguson's eye would appear as though he feared people, and wanted to get out of the way. * * * * I mean a far-off glassy look, as though the mind was dwelling on nothing; then again, it would assume a troubled, feverish look; I describe his look at times when he was quiet, as a far-off look, and when he was in emotion, this wild and glassy look, and particularly if I broached anything about business;—when I brought his mind back to business,—and he would have this troubled wild glassy look, as if he was troubled to

understand you; the wild glassy look was when business was in his mind, and the other look when he was not busy" (Record, page 41, folio 135, page 42, folio 136).

By the testimony of Mr. Ferguson's daughters above referred, and also upon reading the testimony of William M. Mills, contained in the Record, it will be seen that all those symptoms were continuous during the period above referred to, and were strikingly prominent and evident on the last day of his life.

On the morning of April 14, 1876, the body of Israel Ferguson was found in the Central Park of the City of New York, hanging by his neck to the limb of a tree, his handkerchief torn into strips, served as a rope whereby he was suspended (Record, page 26, folios 84 and 85).

3. The expert witness called on the part of the plaintiff below, Ralph L. Parsons, M. D., upon taking into consideration the facts of the case, as set forth in the hypothetical question, which did not include the act of suicide, said that his opinion would be that such conduct would indicate that the person was insane, laboring under that form of mental disease known as melancholia (Record, page 45, folio 145).

4. The expert witness called by the defendant below, George C. S. Choate, M. D., had upon his cross-examination the following extracts, which embody substantially the undisputed facts in this case, read to him from a work entitled, *Pathology of Mind*, by Henry Maudsley, M. D., setting forth the symptoms of this form of mental disease (which questions were not objected to), to which propositions said expert acceded, as will be found by his answers to said questions.

"In some instances it (melancholia) has come on very suddenly in consequence of a severe mental shock, such as the abrupt announcement of the sudden death of one who was very near and dear. More often, however, the natural grief which a sad bereavement occasions passes by slow degrees into a morbid depression."

And said expert was asked the following question: "Is that your experience, as one who has treated similar cases?

A. "I think it is" (Record, page 52, folios 167 and 168).

Again, "Before the profound change of feeling took place the patient has sometimes been distressed by a strange giddiness or numbness or other indescribable sensation in the head, or has perhaps felt as though something had suddenly cracked there."

Question by plaintiff's counsel. "Is that your experience?"

Answer. "My experience is that that is an uncommon thing, but that it may occur." (Same reference.)

Again, "At the beginning of melancholia in most cases and throughout the disease in some cases, there is no definite delusion. The person is simply morbidly melancholy, suffering from *melancholia simplex* or *melancholia sine delirio*, as this conhition of effective disorder has been called. But he is profoundly changed, notwithstanding. His feelings regarding persons and events are strangely perverted, so that impressions which would naturally be agreeable are painful, and the attentions of his relatives occasion irritation or actual distress. He has no interest in his family or in his affairs. * * * He shuns society, which is distressing to him, cares not to do any work, neglects his personal appearance, sinks into inactive brooding, and ends, perhaps, if permitted, by lying in bed all day. All this while he is quite conscious of his unnatural state, and perhaps bursts into tears as he bewails it."

Q. "Is that your experience?"

A. "I think that describes a certain class of cases that I see. They are not very numerous, but it does describe a certain class of cases" (Record, page 52, folio 168; page 53, folio 169).

Again, "Suicidal feelings and attempts are common in melancholia, so much so that one suspects their actual or possible existence, even when they have not been openly manifested."

Q. "Is that your experience?"

A. "It is" (Record, page 53, folio 170).

5. It will appear from the testimony of the defendant's expert (below), taken in connection with the evidence in this case, that the deceased exhibited in his conduct those symptoms which clearly mark and point out the presence of insanity of that type, characterized by the plaintiff's expert as melancholia.

Fourth Point.

1. Upon all the evidence in the case bearing upon the character and conduct of the deceased a hypothetical question was framed and put to the expert witness called on the part of the plaintiff below. This hypothetical question, with its subsequent modifications, will be found in Record, page 43, folio 140 and 141; page 44, folios 142 and 143. And the evidence in the case upon which said hypothetical question was based will be found Record, page 29, folio 93, to page 43, folio 139, inclusive.

To this hypothetical question the counsel for defendant below interposed the objection that it was immaterial and incompetent; the court overruled the objection, to which ruling the defendant below excepted.

But it is submitted that the evidence justified a much stronger statement of facts, and that all statements included in the hypothetical question as amended are authorized by the evidence in the case.

2. Exception was also taken to the question propounded to said expert witness as to the authority of Henry Maudsley, M. D., the author of various treatises on the question of insanity (Record, page 49, folio 157).

But it is submitted that the question as put and answered in no manner prejudices the defendant. Subsequently certain questions were propounded in cross-examination to the expert called by the defendant below, based upon statements contained in one of the treatises of said author, to which questions no exception was taken (Record pages 52, folio 167, to page 54, folio 173 inclusive).

3. Exception was taken by the defendant below to a question propounded to their expert upon the cross-examination, based upon the opinion of Mr. Justice Woodworth of the Supreme Court of the State of Pennsylvania, in the case of the Connecticut Mutual Life Insurance Company *v.* Groom; setting forth in substance the fact that insanity did not necessarily deprive a person of a knowledge of the physical consequences of his acts.

And upon such portion of the opinion so read the following question was asked:

Question—"I ask you whether in your experience the views here set forth are in harmony with your knowledge based on your experience?"

Answer—"In the main I should agree entirely with the extract you have read. There are quite a number of propositions there, and some of these I should not state in exactly that way, but in the main they would correspond with my views" (Record, page 53, folio 172, to page 54, folio 173, inclusive).

It is submitted that this question thus put bore upon the matters under inquiry and was fairly within the scope of the evidence. But even if it had not been it would not have been open to objection in cross-examination. The rule, as laid down by very high authority, is to the following effect:

"In the direct-examination of their own witnesses it would tend to confusion if facts were assumed in hypothetical questions which did not bear upon the matters under inquiry or which were not fairly within the scope of any of the evidence. Upon the cross-examination of an expert counsel may not be so narrowly confined, but may, in putting hypothetical questions, assume any facts pertinent to the inquiry whether testified to by the witnesses or not, with the view of testing the skill and accuracy of the expert, but such cross-examination must, to some extent, be under the control of the trial court."

Dilleber *v.* The Home Life Insurance Company,
87 New York Rep., 79, at p. 83.
Connecticut Mutual Life Insurance Co. *v.* Ellis,
Adm. 89 Ill., 516.

4. Exceptions were also taken by the defendant below to hypothetical questions embodying portions of the evidence in the case (at Record page 54, folio 174, and page 55, folio 176). But it is submitted that said questions so propounded are fully sustained by the evidence in the case and the authorities just before cited.

Fifth Point.

The following exceptions were taken to the refusal of the judge to charge the jury as requested by the defendant below, which will be considered in their order.

1. Exception to refusal to charge "that if said Israel Fergusson died by suicide the plaintiff cannot recover unless he has proven to your (the jury's) satisfaction that such act of self-destruction was not Fergusson's voluntary and willful act; that he had not at the time sufficient power of mind and reason to understand the physical nature and consequences of such act, and did not have at the time a purpose and intention to cause his own death by the act" (Record, page 61, fol. 96.).

The foregoing request is single and entire, and as such is an erroneous proposition of law.

For if the death is caused by the act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning powers are so far impaired that he is not able to understand the moral character, general nature, consequences and effect of the act he is about to commit, such death is not within the contemplation of the parties to the contract, and the insurer is liable.

This proposition has been laid down by this court, and is in conflict with the foregoing request to charge.

Life Ins. Co. *v.* Terry, 15 Wallace, 580.
Ins. Co. *v.* Rodel, 5 Otto, 232.

2. Exception to refusal to charge "that the burden of proof as to this question (insanity) is upon the plaintiff, and if upon the evidence the question is left in doubt, the plaintiff cannot recover."

This proposition is complete and entire, and, as such, incorrect. For while it is clear that the burden is upon the plaintiff to prove insanity, as stated in the judge's charge, at Record, page 56, folio 186, still it is clear that while the prisoner is entitled to the benefit of the doubt in criminal cases, such rule has no application to civil actions.

The judge at the trial charged as follows:

"I shall simply try to impress upon you the consideration that if all the evidence in the case is as consistent with the theory of sanity as it is with the theory of insanity, then it will be your duty to find a verdict for the defendant" (Record, page 60, folio 193).

3. Exception to refusal to charge, "That unless the evidence established that Israel Ferguson did not commit suicide consciously and voluntarily, the plaintiff cannot recover." (Record, page 62, fol. 197.)

4. Exception to refusal to charge, "That if he thus committed it, it is immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong." (Record, same reference.)

5. Exception to refusal to charge, "That if Ferguson was insane, he must have been insane to such an extent as to render him unconscious of the nature and effect of the act of suicide to entitle the plaintiff to recover upon the policy." (Record, page 62, fol. 198.)

The three foregoing propositions have been negatived by this court in Life Ins. Co. *vs.* Terry.

Ins. Co. *vs.* Rodel (*supra*).

6. Exception to refusal to charge, "That if the jury find from the evidence that Mr. Ferguson, impelled by any cause whatever, domestic unhappiness, or financial trouble, or both, *voluntarily and with sufficient reason to know the consequence of the act,* committed suicide, the plaintiff cannot recover." (Record, page 62, fol. 198.)

7. Exception to refusal to charge, "That if circumstances existed that preyed upon Ferguson's mind to such an extent as to lead him to *prefer death to life, and in that state of mind he voluntarily and consciously* destroyed himself, it was a case of death by suicide within the meaning of the contract, and the defendant is not liable." (Record, page 62, fol. 200.)

Bearing upon the two foregoing propositions, the judge at the trial charged the jury among other things as follows:

"If you believe from the evidence that the deceased, although excited, or angry, or distressed in mind, formed the determination to take his own life because in the exercise of his usual reasoning faculties he preferred death to life, then the company is not liable, because he died by his own act within the meaning of the policy." (Record, page 60, fol. 191.)

A court is not bound to give instructions in the language in which they are asked. If those given substantially cover the case, and are correct, the judgment will not be disturbed.

Railway Co. *v.* McCarthy, 6 Otto, 258.
Evanston *v.* Gunn, 9 Otto, 660.
Record, pages 58 to 61 inclusive.

In the former of the two foregoing propositions contained in the requests to charge, the substance of the request is that if the act of insured was done *voluntarily and with sufficient reason to know the consequences of the act*, the plaintiff cannot recover. And in the latter, that if Ferguson *preferred death to life, and in that state of mind he voluntarily and consciously destroyed himself*, the defendant is not liable.

But it is submitted that the deceased might, with sufficient reason to know the consequence of the act, and preferring death to life, have, in that state of mind, voluntarily and consciously destroyed himself, and still have been entirely oblivious to the moral character and complexion of the act he was about to commit.

If the judge had charged the jury as requested in the two foregoing propositions, it would have been a direction to them to find for the defendant, if they had found from the evidence that the act of suicide was the voluntary act of the assured, he knowing and intending that his death should be the result of his act, notwithstanding the fact that they had also found upon the evidence that his reasoning powers were so far impaired that he was not able to understand the moral character, the general nature of the act he was about to commit.

The jury might reasonably have concluded that the language "voluntarily and with sufficient reason to know the

consequences of the act," contained in the former of the foregoing propositions, and the language "voluntarily and consciously," contained in the latter referred to physical condition and not to the moral complexion of the act.

It is the knowledge of the moral character of the act, and not a knowledge of the physical consequences of the act, which avoids the policy in the event of suicide.

Bigelow *v.* Berkshire Life Ins. Co. 3 Otto 284

8. Exception to refusal to charge "that the only legal test of insanity is delusion" (Record, p. 62, fol. 199).

9. Exception to refusal to charge "that there is no evidence in this case of any delusion, and in the absence of such evidence the jury cannot infer the existence of any delusion" (Record, p. 69, folio 199).

On this point of delusion being the only test of insanity, reference will be made to the testimony given by George C. S. Choate, the expert called on the part of the defendants themselves, upon direct examination by defendants' counsel.

In answer to a question as to whether delusion was the "test and touch-stone in the diagnosis of insanity," he replied: "I SHOULD NOT SAY IT IS THE ONLY TEST" (Record, page 56, fol. 178).

To refer to a single instance, the defendant below lost sight of that well defined type of insanity recognized by the courts, where, there being no delusion, the will power has become so enfeebled that the patient is unable to resist the impulse arising in the deranged mind.

And the evidence of the witness Southwick would negative the assumption that there was no evidence of delusion in the case. He, testifying to unusual and remarkable conduct on the part of the deceased, which can only be accounted for on the supposition of some delusion existing in his mind at the time (Record, page 32, folio 105).

And when the conduct testified to by the witness Southwick was rehearsed to Dr. Choate, the expert called by defendants, and the question asked of him, if it would not lead him to inquire into the condition of the mind of deceased, he answered, that it would (Record, page 55, folios 176 and 177).

The latter request is single and entire, and as so submitted to the judge, is erroneous.

Sixth Point.

The following exceptions were taken by the defendant below to the judge's charge to the jury, which will be considered in their order.

1. Exception was taken by defendant below to that part of the charge wherein the court charged the jury "As to these two defenses, gentlemen, it is sufficient for me to say that I rule against the defendant and instruct you that they are not sustained by the proofs in the case." (Record, page 58, folios 184 and 185.)

This exception refers to the following language as used by the court in charging the jury: "The defendant has interposed several defenses to the plaintiff's cause of action, one of which is that the court has no jurisdiction because the plaintiff in the action is not the real plaintiff and cannot maintain the action, having simply a nominal and not a real interest. Another defense is that a former suit was brought by the person whom the present plaintiff represents, which was decided in favor of the defendants upon the same questions as those now involved."

The interest of the plaintiff (below) in the matters in controversy is fixed by the deed of trust. This conclusively shows that he was the only party who could bring the action, his interest in the controversy being similar to that of an executor or administrator. (Record, page 13, folio 45.)

As to the second defense mentioned in the exception, based upon the nonsuit, reference will be made to the first point of this brief.

2. Exception was taken by defendant below to that part of the charge wherein and whereby the court charged the jury that—"The plain, simple question is presented for your consideration and determination, was Israel Ferguson insane, or did he act under an insane impulse, at the time he committed suicide?"

On the ground that the said part of the charge is not correct in law, and on the ground that there is no evidence in this case

whatever under which any theory of impulse can be found, as an impulse is an instantaneous emotion. (Record, page 63, folio 201.)

3. Exception was taken by the defendant below to that portion of the charge wherein and whereby the court charged the jury that "I have said that the single and simple question for you to determine was whether or not Israel Ferguson was insane or acting under an insane impulse at the time he took his life," on the same grounds (Record, page 63, fol. 202).

These exceptions are based upon fragmentary portions of the charge, and are explained and modified by subsequent portions of the charge. (See Record, pages 58 and 59, fols. 187 and 188; also, Record, pages 59 and 60, fols. 191 and 192.)

The charge of the court fully and correctly sets forth the law applicable to this case, and even if extracts from the charge which, if read apart from the connection, might be open to objection, still, when taken in connection with the qualifications contained in the context, it could not have been otherwise than correctly understood by the jury. A charge is not open to exception on any such ground. (Record, pages 58 to 61, inclusive.)

Evanston *v.* Gunn, 9 Otto, 660.

4. Exception was taken by the defendants below to the charge wherein the court charged the jury that, "From that time until the day of his death the deceased was to a greater or less extent despondent, depressed, unhappy, melancholy."

On the ground the evidence shows such to have been the fact only on isolated occasions. (Record, page 63, fol. 202.)

The testimony in the case fully sustains that portion of the charge to which this exception was taken. The entire testimony bears out the statement in the charge. And on this point see Record, page 37, fol. 121; and Third Point of this brief.

5. Exception was taken by the defendant below to that portion of the charge wherein and whereby the court charged the jury "It is for you to say, gentlemen, whether this state of of mind amounted to an unsoundness of mind" (Record, page 63, folio 203).

This statement in the charge was based upon all the evidence in the case bearing upon the state of mind of Israel Ferguson, and was merely leaving with the jury the determination of the question as to his sanity or insanity under all the evidence in the case. To have charged the jury otherwise would have been error. If there was any evidence of insanity the judge could not properly take the case from the jury, and there was clearly such evidence, showing that the deceased labored under that form of insanity called melancholia.

Phœnix Mutual Life Ins. Co. *vs.* Doster, 16 Otto, page 32.

Life Ins. Co. *v.* Terry, 15 Wallace, 580.

6. Exception was taken to that portion of the charge wherein and whereby the court charged the jury as follows: "Because if his reasoning faculties were so far impaired that he could not fairly estimate the moral consequences, the moral complexion of the act, even though he could reason sufficiently well to prepare with great deliberation and to execute with great success his design, nevertheless within the authority I have read he was so far insane the plaintiff might recover upon the policy" (Record, page 63, folio 203; page 64, folio 203).

This was clearly a correct exposition of the law.

Life Ins. Co. *v.* Terry, 15 Wallace, 580.

Seventh Point.

The defendant upon the trial in the court below took exception to the judge's ruling upon the admissibility of testimony, which exceptions will now be referred to.

1. Exception was so taken to the admission of the testimony of the witness Upton, that the witness asked deceased what he would have from the bill of fare, and he did not "*seem*" to know.

And also to the question immediately following the above answer given in explanation—

Q. How did he act?

A. Absent minded, and had no conversation at all (Record, page 32, folio 103).

This was the natural and usual way of expressing the impression made upon the mind of the witness by the appearance of the deceased.

The witness immediately explaining this statement by saying that the deceased was "absent minded," which is an apparent state of the mind so well known to every observer as to need no explanation.

2. Exception was also taken to the admission of the testimony of the witness Fox, that the deceased did not "*seem*" to wish to have any conversation (Record, page 35, folio 114).

The word "seemed" as used by the witness evidently referred to the manner and appearance of the deceased. Such an unwillingness may well be indicated without spoken words or even actions by that something present in the manner of a person which would be most naturally expressed by the words used by witness.

3. Exception was further taken to the testimony of the same witness when he said that the deceased was standing by the foot-path looking *vacantly* down.

The witness immediatedly explained to the court that he meant to say "that he (deceased), had a vacant expression in his face." (Record, page 35, folio 115).

The word "vacantly," as used by the witnes referrs, to an appearance which would immediately convey to the mind of all the expression referred to. And the witness removes all doubt as to his meaning by the explanation that he referred to "vacant expression in his face" which words were not objected to.

4. Exception was taken to the testimony of the witness Nellie Ferguson that the deceased, her father, "*seemed*" to want to be by himself.

The witness immediately explained this testimony by saying, "He went by himself, and he stayed by himself in a dark room."

So removing all doubt as to what she meant when using such language, and showing that she simply referred to the conduct of the deceased.

5. Exception was taken to the admission of the testimony of the witness Walker that the deceased "looked very sadly." (Record p. 42, fol. 138).

This also referred to the appearance of the deceased,and as the witness well, said "he could not describe it in any other way."

6. Exception was taken to the testimony of the witness Mills that "Mr. Ferguson's eye would appear as though he feared people and wanted to get out of the way. That's what I mean by his eye becoming wild. * * * * *I mean a far-off, glassy look, as though the mind was dwelling on nothing*" (Record, p. 42, fol. 136).

The entire sentence of the witness' testimony stated above, including the clause objected to in italics, indicates very clearly the appearance of the deceased, which the witness was endeavoring to express.

The jury were entitled to know the appearance of the countenance of the deceased on the occasion referred to as indicating his apparent state of mind.

7. Exception was taken by the defendant below to the following question put by counsel for plaintiff:

"Please state to what extent you know that Mr. Israel Ferguson depended upon your husband in the carrying on of the business" (Record, page 34, fol. 111).

A slight error has crept into the phraseology of this question as put by the counsel for plaintiff below, by omitting the word "if" before the words "you know." The question should read: "Please state to what extent, if you know," &c.

The counsel for defendant below did not base his objection to the *form* of the sentence, but to its relevancy.

It was clearly not irrelevant, as a short statement of the facts of the case will show.

An examination of the testimony will show that the death of